CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

JUNE TERM, 1834.

PETER R. DAVIS *et. al. upon the relation of* THEOPHILUS SNOW *v.* JAMES SOMERVILLE.

A guardian bond taken according to the act of 1762 (*Rev. ch.* 69. § 7.) is nothing but a common law bond payable to the individuals on the bench, and if executed by one of them, is void.

The cases of the *Justices* v *Dozier*, (*ante* 3. *vol. p.* 287) the *Justices* v *Bonner*, (*Ib.* 289,) the *Justices* v *Armstrong* (*Ib.* 284,) and the *Justices* v *Shannonhouse*, (*ante* 2 *vol. p.* 6.) approved.

DEBT upon the following bond:

"Know all men by these presents, that we R. H. J. "and *James Somerville* of &c. are held and firmly "bound to *Peter R. Davis*, *Richard Bullock*, and *James* "*Somerville*, Justices of the Court of Pleas and Quar- "ter Sessions for the county of Warren in the sum of "&c. to be paid to the said Justices or the survivor or "survivors of them, their executors or administrators on trust &c." with a condition that R. H. J. should well and truly improve the estate of the relator, to whom he had been appointed guardian. On the trial at Warren on the last circuit, the only question made in the cause arose upon the plea of *non est factum*, and on that it was admitted that the defendant was the same *James Somerville* who was mentioned in the bond as an obligee, and who was one of the plaintiffs. It was also admitted that the defendant and the other obligees were the Justices

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in court at the time the appointment of guardian to the relator was made.

Upon these facts his Honor, Judge SETTLE directed a nonsuit to be entered, and the plaintiffs appealed.

W. H. Haywood for the plaintiffs.

Badger contra.

DANIEL, Judge.—This guardian bond was taken under and by virtue of the act of 1762, (*Rev. c.* 69. *sec.* 7.) which directs a guardian bond to be made payable to the "justices present in Court, the survivor or survivors of them, their executors or administrators." It has been argued by the plaintiff's counsel that the justices who were present in Court, (one of whom was the defendant,) when the appointment of the guardian and execution of the bond took place, were a *quasi* corporation for that particular purpose, and although the defendant was one of the corporators, yet he in his individual character, might give a bond to the corporation, and it would bind him.

In the case of the *Justices of Currituck* v *Dozier*, (*ante* 3. *vol. p.* 287,) where the case stated that *Dozier* was both obligor and obligee with others named in the guardian bond, this Court said, "a guardian bond according to the statute is nothing more than a common law bond payable to individuals and their personal representatives, in trust for another, that *Dozier* was both obligor and obligee, and the bond was void. It seems to us that the abovementioned case, and that of *The Justices* v *Bonner*, (*ante* 3 *vol. p* 289) which is in all things similar, must govern the one now before the Court.—This case comes within the rule laid down by the Court in the cases of *The Justices* v *Shannonhouse*, (*ante* 2 *vol. p.* 6.) and *The Justices v Armstrong*, (*Ib.* 3. *vol.* 284.)

We think the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

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JOSIAH COLLINS & WILLIAM D. RASCOE.

Where the bargainor having signed and sealed a deed, said to the attesting witness "I acknowledge that to be my act and deed." *It was held* that these words being addressed to one who was not intended to take possession of the deed, did not amount to a delivery.

And where after the deed was thus executed, the agent of the bargainee offered to take it and carry it to him, he being out of town, but the bargainor objected, saying it might thereby be lost, and that he expected the bargainee back that night, and would himself hand it to him. *It was held* that this refusal of the bargainor to part with the custody, destroyed the effect of his antecedent words.

Held also, that the jury could not infer from the facts above stated, a delivery at the time of the bargainee's return, but only at the time when the deed was proven to be in his possession.

Where a deed of trust was duly proved, but because of the sickness and death of the Register was not registered within six months, but was registered as soon as a successor was appointed, it is void as to the creditors of the bargainor.

The case of *Moore* v *Collins*, (*ante* 3 *vol. p.* 126,) overruled, and that of *Ridley* v *McGehee*, (*ante* 2 *vol. p.* 40,) doubted.

After the new trial granted in this cause at December Term 1831, (*ante* 3 *vol. p.* 126,) it was tried again on the Spring circuit of 1834, before NORWOOD Judge, at Chowan.

The statement of facts certified with the record, set forth the deed made by *Creecy* to the plaintiff, as it is stated in the before mentioned case; it is sufficient to say that it was executed to secure sundry debts of the bargainor, was dated the 15th day of September 1829, proved at the term of Chowan County Court commencing the ensuing week, and the certificate of registration was of the 27th of March 1830.

To prove the execution of the deed, the plaintiff called *Robert H. Smith* one of the attesting witness, who stated that on the 15th of September 1829, he was requested by *Thomas Benbury* one of the *cestui que trusts*, to go to the house of *Creecy*, and attest the execution of a deed —that he went with *Benbury and Dr. Matthias, E. Sawyer*, the other attesting witness, and found there *Creecy*

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and *William R. Norcum*, the latter of whom was also a *cestui que trust*. That the deed was lying on a table in the room, that *Norcum* filled up some blanks in it, that in a short time *Creecy* went to the table and signed the deed, and the witness and Dr. *Sawyer* attested it. That the deed was left on the table, and immediately he and Dr. *Sawyer* withdrew, leaving *Norcum* and *Benbury* with *Creecy*. The witness further stated that the plaintiff was from home at this time—that he returned the latter part of the same week, and that he, the witness, neither saw nor heard any thing more of the deed until the Tuesday following; which was the week of Chowan County Court, when he was called upon to prove it.—Dr. *Sawyer* stated that *Creecy*, after he signed the deed said, "I acknowledge that to be my act and deed."

William R. Norcum was called by the defendants—upon his examination by the plaintiff, he stated that he and others of *Creecy's* creditors, among whom was *Benbury*, employed the plaintiff to draw the deed; that in a short time thereafter the plaintiff informed him that he was going out of town to attend the Superior Court of Washington, that the deed was drafted, and was in *Benbury's* possession for the purpose of being executed; that he, the plaintiff, was fearful that *Benbury* might be negligent and that he wished the witness would attend to its execution. That on the 15th of September 1829 he, the witness, went with *Benbury* to the house of *Creecy*, where he found the deed, that he having filled up several blanks in it, *Creecy* signed and sealed it—that after the attesting witnesses had left the house, the deed was lying upon the table for the ink to dry—that as soon as this was done he went to the table, saying to *Creecy* that he was going to Washington Superior Court, when he should see the plaintiff, and that he would carry the deed and hand it to him—that *Creecy* remarked, he, the witness, might miss the plaintiff on the way, and thereby the deed might not get to the hands of the plaintiff in time—that he, *Creecy*, expected the plaintiff back that evening or the next morning, when he would himself hand it to him. The witness also stated that *Benbury*

was in an adjoining room nearly all the time he, the witness, was in *Creecy's* house—that he came into the room where the deed had been executed during the period which elapsed after the departure of the attesting witnesses, and the conversation above stated, and that they, the witness and *Benbury*, left the house together.

The County Court commenced on the next Monday, the 21st, and the minutes of Tuesday the 22d, contained the following entry, "Deed of trust from *James R Creecy* to *Augustus Moore* was exhibited in open Court, the execution of which was proved by the oath of *Robert H. Smith*, and ordered to be registered, (withdrawn by Mr. *Moore.*")

The clerk of the County Court proved that after the probate of the deed, he made the usual certificate, and was about to file it when the plaintiff asked for it, and took it away, saying that he would hand it to the Register. It was proved that the Register did receive the deed between four and six weeks after its probate, that the Register was then in very bad health, and died in December following, leaving the deed among his papers, but unregistered, and that no successor was appointed until the ensuing March term of the county court. It was also proved that the Register was the clerk of the defendant *Collins*, and usually attended to his business, and that he had a short time after the deed came into his possession, handed the orignal to Mr. *Collins*, for the purpose of having it copied.

The defendants, *Rascoe* being the Sheriff of Chowan, justified under a writ of *fieri facias* against the property of *Creecy*, in favor of the defendant *Collins*, tested of the second Monday of September 1829.

Several points were taken for the defendants, of which it is necessary to notice only the following :

1st. It was contended that the instrument relied on as the deed of *Creecy*, was void as against them, because it was not registered within six months after its execution, as required by the act of 1820, (*Rev. ch.* 1037.)

2d. That no valid delivery of the deed had been made by *Creecy*, prior to the 22d of September, the Tuesday of

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the County Court, at which time the lien of the execution in favor of the defendant *Collins* had attached.

His Honor instructed the jury that if the plaintiff within five or six weeks after the probate of the deed, delivered it to the Register for registration, and its registration was prevented by the ill health and death of the Register, and the delay of the County Court in appointing a successor, it should be considered as registered within due time—leaving the facts attending the execution of the deed to the jury, his Honor informed them, that if *Creecy* in the presence of the attesting witnesses and of *Norcum*, declared the instrument to be his act and deed, unaccompanied by any other declaration or act, at the time, manifesting that he was to retain the controul and power over it until some future period, the declaration amounted in law to a delivery at that time—that if the jury should think that the fact of *Creecy's* declining to permit the deed to be taken by *Norcum*, and retaining it himself was, as he declared it to be, for the purpose of keeping it more securely until he could hand it to the plaintiff, his so refusing to surrender the custody of the deed, and retaining it in his own possession, did not do away the efficacy of his prior delivery of it, and that if the jury, should upon the testimony before them, come to the conclusion that the deed was not then delivered, it was for them to decide, upon the whole evidence, whether it was subsequently delivered before or after the *teste* of the execution.

A verdict was returned for the plaintiff, and the defendants appealed.

The case was discussed at great length at the last June term, by *Gaston* and *Badger* for the defendants, and by *Iredell*, *Devereux*, *Bryan*, and *Kinney* for the plaintiff, and was continued under advisement until this term.

DANIEL, Judge.—This was an action of Trover, brought by the plaintiff to recover certain slaves and other property, mentioned in an instrument of writing, purporting to be a deed of trust, made by *Creecy* to the

plaintiff. The defendants pleaded the general issue, and on the trial took five objections to the recovery of the plaintiff. I shall take notice of the charge of the Judge of the Superior Court only on two of the objections.—First: whether the instrument which the plaintiff calls a deed of trust, ever was delivered, so as to constitute it a deed, or if it was, whether it was delivered at a time subsequent to the lien created on the property, by the test of the defendant's execution. Secondly: whether the deed of trust under which the plaintiff claims, was registered in six months, as is required by the act of Assembly passed in the year 1820.

The Judge who tried the cause, in his charge to the jury, told them that the words made use of by *Creecy*, at the time he signed and sealed the paper, would in law, amount to a delivery of the deed. I cannot agree with him in this opinion. The delivery of every deed must be proved as well as the sealing of it,—being an essential requisite to its validity. The deed, if delivered, is good from the time of the delivery, and not from the date expressed on the face of the instrument. A deed may be delivered by words, without any act of delivery by the grantor, as if the writing sealed lieth upon the table, and the feoffor or obligor, saith to the feoffee or obligee, go and take up the said writing, it is sufficient for you, or it will serve the turn, or take it as my deed, or the like words, it is a sufficient delivery. (2 *Thos. Coke*, 285.) But the words must be addressed to the feoffee or obligee, or some person for them. The words must amount to an authority or license, in the person addressed, to take possession of the deed, and a reception of the instrument by the person spoken unto, must follow the speaking of the words. Whenever the words evidence an assent in the feoffor or obligor to part with the writing as a deed, and at the same time evidence a willingness that the person spoken unto should take the writing as a deed, and a reception of the writing by the person addressed follows the speaking, then the words amount in law, to a delivery. In the present case, the words spoken by *Creecy* before the witnesses

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attested the instrument, were addressed to the witnesses, and not to *Norcum*, the plaintiff's agent. If the words spoken by *Creecy* had been addrsssed to *Norcum*, the subsequent words and acts of *Creecy*, in refusing to let *Norcum* have the paper, destroyed the efficacy of the antecedent words. It does not appear that the paper purporting to be a deed of trust, was ever in *Norcum's* possession or power, or that it was intended he should receive it. It seems to me that there was not any delivery of the deed of trust, on the day it bears date, viz: on the 15th September 1829. But say the counsel for the plaintiff, if there was not a delivery on the day the deed bears date, there was sufficient evidence in the cause for the jury to infer a delivery of the deed to the plaintiff, before the *teste* of the defendants execution, which was on Monday, the 21st of September, 1829. The declarations of *Creecy*, that he intended to deliver the deed to the plaintiff as soon as he came to town, and that he was expected that evening or the next morning, and the evidence of *Smith*, that the plaintiff did come to town, the latter part of the week next before the week of the County Court, taken in connexion with the fact that the plaintiff had possession of the paper on Tuesday, in the succeeding week—all this evidence, say the counsel for the plaintiff, was sufficient to authorise the jury to find, that the deed had been delivered before Monday, the date of the defendant's execution. It is further contended on behalf of the plaintiff that as the jury have found the fact that the deed was delivered before the date of the execution, this court cannot interfere with the verdict, and grant a new trial, nor disturb the judgment given thereupon, although the jury may have found contrary to the weight of the evidence, that belonged exclusivsly to the Superior Court that tried the cause.

It seems to me that there was evidence sufficient for the jury to have inferred, and so found, that the deed had been delivered. But I think there was no evidence that could authorise them to do more than barely to guess that it was delivered before the date of the defendant's execution. It appears to me that there was no

evidence to establish the *isolated fact* that the time of the delivery of the deed, was prior to the time of the issuing of the execution. There being no evidence to establish that point, the judge should have directed the jury to have found for the defendant, and not have left it discretionary with them to give a verdict any way they might think proper. The *onus* of establishing the fact, viz: of delivery of the deed before the *test* of the execution lay on the plaintiff. (*Dickson* v *Evans*, 6 *Term.* 60.) The other point in this case on which I deemed it necessary to give my opinion, is, on the question, whether the deed having been left with the register in time for it to have been registered, is to be considered in law as registered.

The act of Assembly, passed in the year 1820, requires a deed of trust to be both proved and registered, in six months; or to be considered utterly null and void as against creditors and purchasers for a valuable consideration. The acts of Assembly usually passed every two years, giving further time to prove and register deeds and mesne conveyances, contain a proviso to the following effect, "nothing herein contained, shall be construed to extend to mortgages, or to deeds or conveyances in trust." The Legistature has refused to give any further time to prove and register deeds of trust, than that contained in the act of 1820. If a deed of trust was offered to be read in a court of law, containing only a probate without a certificate of registration, could it be received? Could the person offering it, excuse himself for not having the register's certificate of registration endorsed on the deed, by alleging the fact that the register would not perform his duty, although the deed was left at his office a sufficient length of time to have enabled him to have registered it? This is the question now, for us to decide. For I take it the actual registration of the deed by the new register after the six months had expired, was without authority of law and is a nullity. The register is certainly liable on his bond, to make good the damages that any person may sustain by his negligence and omissions. But is

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the deed in law registered, by leaving it at the register's office a sufficient length of time to enable him to enroll it, before the six months had expired? The plaintiff contends that it is, and many cases have been cited from the English law books, of decisions upon the navigation acts, the annuity acts, the mortmain act, and the act for the enrollment of deeds of bargain, and sale of freehold estates in land. *Ridley* v *McGehee*, (*ante* 2 *vol. p.* 40,) and the decision of this Court on this case at a former period, (*ante* 3 *vol. p.* 127,) have been cited. First, as to the ship registry act. A vendee of a ship in England must, under the statute of 34 G. 3. support his title by a bill of sale, or some written contract, but it is not necessary for the completion of his title that the bill of sale should be registered. When the ship is in port at the time of the sale, the law requires that the contract of transfer should be endorsed upon the certificate of registry, and a copy of the endorsement left with the officer of the customs, at the port where the ship belongs, in a reasonable time after the transfer: and if the ship is at sea at the time the bill of sale is executed, that the vendee should within ten days after the vessel arrived in port, have the endorsement of the contract entered on the certificate of her registry, and a copy thereof delivered to the officer of the customs. Whenever the vendee of a vessel was able to shew that he had taken a written transfer, and had complied with these provisions of the statute, his title was complete by the meaning of the Legislature, as is to be collected from the very phraseology of the 15th and 16th sections of the 34. G. 3. without his shewing that the officers had made entries of the transfer, and memoranda or registration of the transaction in the books of his office, and sent a copy thereof, in the time prescribed to the commissioners of customs at London. The object of this statute was not to give notice of the transfer, or to prevent frauds upon creditors and purchasers, but to prevent foreigners participating in the tonnage and navigation of British vessels. The duties of the officer of the customs at the port, as well as the duties of the commissioners of the

customs at London, as prescribed by the 34 *G.* 3, are only directory. Their entries were not intended to constitute any part of the title of the vendee. (*Hubbard* v *Johnstone*, 3 *Taunt.* 176. *Heath* v *Hubbard*, 4 *East.* 110.) I do not think that the cases cited, which have arisen under this Statute, have any bearing on the case now before the court.

Secondly: As to the decisions upon the Statute, 17 *G.* 3, *c.* 26, concerning the registration of the memorials of annuity deeds. This statute requires that the memorial shall be enrolled within twenty days from the date of the deed, and if it is not done in that time, the securities are avoided. The act requires that a particular roll shall be provided and kept, on which such memorials shall be entered, and proceeds to enact that every such memorial shall be duly enrolled, in order of time as the same shall be brought to the officer, and that the clerks of the enrollments shall specify on the roll, the certain day, hour and time, in which the memorial is brought to the officer, and shall grant a certificate thereof when required. If a memorial of any annuity is carried into the office within the twenty days, and the clerk specifies on the roll the time that it is brought to the office, let the residue of the enrollment be completed when it may, the memorial enrolled shall be conclusive, and no averment or evidence, shall be received, to shew that the date is incorrect, *Garrick* v *Williams*, (3 *Taunt.* 540.) The construction which the courts have put on this statute, proceeds altogether upon the circumstance that the law requires the clerk of the enrollment to enter on the roll the day and hour the memorial is delivered into the office, and likewise from a disposition in the courts to give to the act that operation intended by the Legislature. It was said by Chief-Justice *Mansfield*, that it might be impossible for the officers to put the entire enrollment of all the memorials on the roll every day, or even every month. Our act of 1820, has no clause directing the register to note in the books of registry, the day of the delivery of a deed of trust to the officer. A subsequent

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act passed in the year 1829, has required it to be done, but this case is governed by the act of 1820. The Legislature in allowing the deed of trust to be proved and registered in six months, has given ample time. There is no danger to be apprehended of such a press of business in the office, as to deprive a party of the benefit of the act, if he uses ordinary diligence.

Thirdly: the statute of 27, *H.* 8, *C.* 16, requires all deeds of bargain and sale for the conveyance of freehold estates in lands, to be enrolled in six months after their date, or they shall have no effect. *Mansfield*, C.J. in delivering his opinion in the case of *Garrick* v *Williams*, remarked that since the 16th of *Elizabeth*, the date of enrollment had been entered, and the courts look to the roll only, and no further. He cites *Hynde's* case, (4 *Rep.* 71.) and *Gilbert* on uses. The same rule has been followed I suppose, as is laid down by the courts, in the case, of the enrollment of the memorials of annuities. This explains the reason why we are unable to find any case in the books upon this subject.

No case can be found decided under the mortmain acts which throws any light on the subject. I think I may say there is nothing in the British authorities that can aid us in deciding this cause. We will advert to the decisions in this country. The case decided in Connecticut, and reported by *Kirby (page* 72,) is in unison with the decisions of the British Courts under the annuity act. The law of that State requires the day when the deed is delivered to the Registers, to be entered on the roll, and the court would not permit parol evidence to be let in, to shew a registration at a different day. In this State, there is the case of *Ridley* v. *McGee*. The principle decided by the court in that case is very near being in point for the plaintiff in this. A majority of the judges of the Supreme Court, when this case was before them at a former period, were of the opinion that the plaintiff had done all that the law required him to do. The judge who delivered the opinion of the court, rests the opinion on the ground that the Legislature had failed to provide an officer. The want of registration, he says, is not to be imputed to the grantee, nor ought

the defendant to derive any benefit from the failure, because the Legislature enacted the provision of registration for his benefit; and if through its omission, there was no register, he cannot complain. It appears to me that the judge mistook the facts. The deed was proved on the 22d of September, 1829, and the register lived until some time in the month of December, in the same year. The deed was placed in his hands five or six weeks after the day it was proved in court.—The first point insisted upon by the plaintiff was that his deed had not been registered in six months, not because there was no register, but because it had been prevented by the negligence of the Register without the default of plaintiff. *Ridley* v *McGee*, is a case as it appears to me, that stands on its own bottom. I know of no authority either in the English or American adjudications to support it. What was heretofore done in this case, I consider rather as a breaking of the cause than as having a binding effect on the court in this its ultimate determination. After giving the case all the attention and research I am able, I am forced to say, sitting in a court of law, that the Superior Court should not have permitted the deed of trust to have been read as evidence to the jury without registration, and that leaving it at the Register's office, under the circumstances stated, was not in law, a registration. The reason made use of by the member of this court, who dissented from the opinion delivered when the case was here before, is so strong and cogent as to convince my mind, and forces me to decide for the defendant.—What a court of Equity would do, if the case were there, we are not called on to say.

I am of the opinion a new trial should be granted.

RUFFIN, Chief-Justice.—I feel that I am called upon to make some observations upon one of the points made in this case; and I propose to confine myself to that.

The judge who tried the cause, held that the deed was duly registered. In that particular he delivered an opinion conforming to that of this Court in this case when here in December 1831, and in opposition to that

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entertained by himself upon the first trial. Had I sat at the last trial, I should certainly have acted as his Honor did. Indeed, I must say, that sitting even where I do, I have entertained the second argument with the greatest reluctance. A question on which the Court is divided must be admitted to be at least doubtful, and one purpose of a Court of final resort is, to render that certain which was before in doubt. This is one of the most useful functions of such a court: to establish the rule, and settle the law. None assuredly can be more sensible than myself of the importance of respecting the decisions of this Court, as definitively fixing the precise point decided. It cannot surprise that I should privately entertain the opinion I formerly did, because nothing but a deep conviction could have prevailed on me to dissent publicly from the eminent men under whom I sat in 1831. Yet upon the motives alluded to, it would become me to yield my own judgment and conform to theirs, and so I should unhesitatingly, if the opinion entertained by the present members of the Court, did not make it necessary for me again to dissent from them, in giving my voice in conformity with the former decision. My brethren think, as the question is brought here for review in the very case in which it was decided, as the decision is itself recent, and has not become incorporated inveterately into our jurisprudence, so as to become a rule of property on which counsel and the community have acted to a great extent, that it may if wrong, be corrected without introducing an evil in the remedy, greater perhaps than that constituted by the error itself. Being thus obliged again to express my opinion, and entertaining now, notwithstanding the unfeigned deference which I profess for the knowledge and parts, and the profound reverence which I cherish for the memories of those great men, the same sentiments I then did, I must express my real opinion, and act on it as it is.

The principle which governed me before was stated to be this. That the statute in *express* terms without any proviso, saving, or equity, declares a deed not proved and *registered* within six months *void*. The same prin-

ciple governs me yet, I cannot get rid of it. Nor have I been able to devise the means of controlling the direct and emphatic words of the statute, upon any reasons of the hardship of a case, supposed or imagined not to have been within the contemplation of the Legislature. My opinion is, that when a statute prescribes a ceremony as necessary to the legal validity of a contract or instrument, there can, *at law*, be no substitute for it, nor can it be otherwise dispensed with, on any pretence. The instrument would as a deed of trust be as effectual without a seal, as without registration. So, a parol contract, when one in writing is prescribed, as in the statute of frauds, has never been admitted at law to be binding, under any circumstances, though under many, such contracts are enforced in equity. Unless the prescribed ceremony exists, a court of law cannot hear the instrument as evidence. Like a stamp when that ceremony is required, registration impresses on the instrument its competency as evidence.

The principle is not impaired when its application is to an act to be done by a public officer, or other third person. It may be possible that it would be, as against the person himself on whom the duty is imposed. It is likewise true, that an act may be so framed as to make it apparent, that some of the provisions are addressed to a private person, and some exclusively to an officer; and in many instances the latter may, upon the intention, be held to be merely directory, and not as avoiding private contracts upon the non-observance of those directions by the officer. But this can never apply to a case, in which the statute is positive, *that for the want of those very things*, which the officer is to do, and which he alone can do, *and for the want of them only*, the instrument shall be void. It would render the statute contradictory and absurd upon its face. I cannot conceive a justification to the judiciary for refusing obedience to the plain words of a statute, which the Legislature is competent to pass. In the form of adjudication, I should consciously feel it in my own case, to be legislation.

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I do not think it necessary to enlarge upon the danger of such irresponsible legislation. But to the judiciary itself it would be attended with interminable and distressing inconveniences. This law was intended to establish a clear and certain rule in every case, whereby the rights of general creditors and purchasers, as against deeds of trust might be determined by a single matter of fact, simple in its nature, susceptible of clear and explicit proof of record as it were, and not susceptible of any variations by the shades which surrounding circumstances might cast on it. But once admit a departure from the law and we shall let in a thousand questions upon diligence, accident, the fraud of the officers and others, and the acts of God, which it will take ages to settle, and which perhaps never can be settled until another statute should sweep down the cobwebs of the closet. Suppose these cases: that instead of the Register dying, he should be sick, or that he should be contumacious and refuse to register the deed, or that the witness refuse to prove it, or got sick and could not, and the party would not acknowledge it, or that it were mislaid by accident. In all these cases and the like, the hardship is the same; and in all, the law is alike to be left out of sight. Another case: Suppose the clerk had refused to deliver the deed to Mr. *Moore*, or to the Register, or had burned it; surely, those cases would be within the reason of this, and proof of the contents of the deed, though unregistered, must be heard. Yet state the case on the other side, and it is obvious to our apprehension, that the principle cannot be carried out, and will itself, work injustice. If the deed had been delivered by *Creecy* to Mr. *Moore* on Tuesday, so that Mr. *Collins'* execution, tested of the day preceding, would have a preferable lien when sued out; but yet the clerk, by conspiracy with the plaintiff, had positively refused to make out a *fieri facias* until after the next succeeding term: No body will say, that at law, the lien would remain, or that upon suing out the execution four months afterwards, it could be carried back to the day, as of which it ought to have been tested. Why shall one of

these creditors suffer loss from the malfeasance of the same public officer, and the other not? How can this be done at law, upon a supposed equity, when in a court of equity the principle is, that creditors have equal equity, and that he to whom accident or dilligence, or Providence, or any other means, except his own fraud, gives advantage, may keep it, it being a plank in a storm. The plaintiff does not pretend an equity against his antagonist. His complaint is against the law, and the officer of the law. A complaint of the former kind, a court cannot redress; nor one against the officer in this form.

I need not repeat the references to the methods of pleading deeds enrolled, nor to the decrees in Chancery against a purchaser with notice of a prior unregistered deed. I only remark, that they retain their former impression on my mind.

But cases have been cited for the plaintiff in the last argument, which do not tend as I understand them, to shake my opinion; but which it is proper I should nevertheless notice.

Those upon the British navigation acts do not require particular analysis, because they are less applicable than those on the statute of enrollments, and of annuities. Indeed a decision in any way, upon those voluminous and complicated navigation statutes, would be deemed but an authority on the construction of the very claims under consideration.

But the Statutes of Enrollment (27 *Hen.* 8,) and the Annuity act, (17 *Geo.* 3,) come nearer to ours. The former like ours, says that no use in an estate of freehold, shall pass by deed of bargain and sale indented, *except* it be enrolled within six months. The act of 1820, says no deed of trust shall be good, as against creditors and purchasers, unless it be proved and registered within six months; and then with an apparent purpose to make all believe the Legislature to be in earnest, it is repeated in the last sentence, that all deeds *not* so proved and registered, shall be held as utterly *null* and *void*. The 17 *Geo.* 3, requires every memori-

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al to be enrolled within twenty days and directs that a particular roll shall be provided for that purpose, and that each memorial shall be duly enrolled in the order of time it shall be delivered to the officer, and that "the clerk shall specify on the roll, the certain day, hour or time, on which the memorial is brought to the office, and shall grant a certificate of the enrollment when required?"

It is supposed that it has been held under these acts, that a delivery into the office, satisfies the act, and as between the parties, amounts to enrollment. An authority to that effect, I should admit to be directly in point. Those adduced do not seem to be of that character, but to the contrary. They are *Hynde's case*, (4 *Rep.* 68,) add *Garrick* v *Williams*, (3 *Taunt.* 540.) I will consider the latter at once. The case was, that the memorial of an annuity was in due season, inaccurately enrolled, and some years afterwards, the clerk corrected it in the margin, by the original in the office, and before any attempt to vacate it. Upon the ground of this error, the grantor moved to set aside a judgment taken under a warrant of attorney given to secure the annuity, and to vacate the the warrant itself. To meet this case, the grantee produced a certified copy of the enrollment as corrected, and purporting to be as of the day of delivery into the office, within the twenty days. He also read the affidavit of the clerk, explaining the error and its correction, and that it was the course of the office, thus to make corrections, and also upon receiving a memorial, and marking on it the time, thence to consider the enrollment complete, and afterwards to enroll it as of that time. The court though, inclined to sustain the proceeding if possible, in respect to the course in the office, yet admitted the question to be attended with considerable difficulty, and took time to advise on it. The opinion was afterwards delivered by Chief-Justice *Mansfield* against the application. He confines himself to the single reason, that the court would look to the enrollment as it then was, and to that only, and as that was correct, would enquire no farther It is plain that the evidence in the

affidavits was wholly disregarded, and that no attention was paid to the particular hardship or circumstances.— How far the ground of decision is consonant to principle, or meets the views of the Legislature it is not for me to judge. But admitting it to be correct, the point decided is essentially different from that in question before us. Our case is, that it appears upon the registration itself, that it was made after the expiration of six months.— Had that been so in *Garrick* v *Williams*, the Court of Common Pleas must upon their own principle, have held it void, although the memorial had been deposited within twenty days. The fact was, the enrolment was not within twenty days, but it purported to be so. The Court say they will hear nothing against the statements in the enrolment. Why? Because, if they did hear it, the whole would be avoided. The decision is not that the facts if shewn were insufficient; but that the official certificates on the original and rolls should not be contradicted. This implies that the case in support of the motion, if sustained by competent evidence, was in itself sufficient. For the reason for excluding the evidence was that it would prove the certificates to be false in respect of the time, and if thus false, the law avoided the whole.

Whether registration in our law by a person not an officer of a Court of record, and not purporting to be of any term of such a court, can to any purpose be regarded as a record, not admitting of contradiction, it would be but a *dictum* now to mention. If it even be so then both upon the real fact, and upon the fact as appearing on the deed and registration, this case is against the plaintiff. Here the defendants aver nothing against the record, but rely on the fact as therein set forth. The registration was not within six months as stated in the registration. The evidence therefore comes from the plaintiff himself; not indeed that the certificate is false, but to shew that the deed could, and ought to have been registered sooner.

The Court of Common Pleas said that as the clerks might not be able to enroll all the memorials that were brought in, as they were delivered, the delivery into the office ought to be considered the enrolment. The

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judges could not deny that this was against the act of Parliament, and could not be carried through, if the real time of the registration appeared. To avoid that consequence, resort was had to artificial reasoning to establish the enrolment, by a fiction, to be at an earlier day than it really was. This is said to be upon the authority of decisions in the old law upon the statutes of enrolments, that the Court should look to the roll and no further. *Hynde's case* is also there referred to, and *Gilbert on uses*, and *Sir T. Howard's case*, (*Owen* 132.) *Gilbert* says, "as to averring an enrolment, this must be understood when the time was not entered on the record; but since 16 *Eliz.* the date of the enrollment has been entered." I have been unable to find the case stated to be reported in *Owen*, but I have no doubt the point is ruled there, as we find it mentioned in other books of authority. *Chief-Baron Comyns* lays it down, (*Bargain & Sale, B.* 10.) that before 16 *Eliz.* no day of enrolment used to be entered, and then it might be averred that it was not enrolled within six months, but since that time, it cannot be averred that it was not enrolled *at the day endorsed* for the enrolment, *for that is part of the record.* For this he cites with his approbation, 2 *Roll.* 119, 120. Those reports are not to be had here, but the case referred to, is *Worsly* v *Felisker*, and is stated as from *Roll.* in 14 *Vin. Abr.* 443, *Inrolment, A. pl.* 4. as follows: An indenture of bargain and sale, was enrolled in Chancery, exemplified under seal, and at the end was a memorandum, viz: that it was enrolled, but no time mentioned when it was done, but the plaintiff offered to prove by circumstances that it was within the six months. Upon which great debate arose, but a Clerk being sent to the enrolment office by the Court, to know their usage *as to inserting the time of the enrolment*, he certified on his oath, that they informed him that before the 16 *Eliz.* (at which time the enrolment office was erected,) they did not use to insert the time, but they are used to do otherwise now; which was 17 *Jam.* 1.—Mr. *Viner* says in the margin, that now it is constantly used, and to good purpose in respect to

the more easy and readier proof of the enrolment upon any occasion, for credit is given to the endorsement *without any further proof*, as being made by a known officer, intrusted for that purpose.

From these authors, it thus appears the certificate is evidence as well of the time, as of the fact of registration, and moreover, that being there, to this purpose, considered in the light of a record, no direct averment can be received against it.

To a certain extent their rules have been received here. The certificate of the Register is evidence of the registration of a deed, requiring it, on which it is read without other proof of the registry, and in a case in which the time of registry is material, doubtless the certificate to that fact is, at the least, *prima facie* evidence of it. Whether it be conclusive is not so clear, and has never been decided. If both the registry and the certificate on the deed be silent upon that point, it must of necessity be open to proof from any person whom the time affects. (*Doe ex dem, Haughton & Slade* v. *Rascoe & Gray*, 3. *Hawks* 21.)

But whenever it does appear by any of those means, legally competent in any particular case to bring the fact to judicial cognizance, that the registry was at a particular time, all advantage may be taken of the fact, either in giving effect to, or impugning the operation of the deed. *Garrick* v *Williams* is itself authority to this point; for the Court to escape from the effect of the fact, would not hear evidence of it, because inconsistent *then* with what was called the record. To this case the principle was applied, that respects an entry *nunc pro tunc*, as being the original entry. But the general proposition just laid down is fully supported from the very authority (*Hynd's case*) cited there, and relied on in the argument here.

That case was that tenant in fee leased for years, and then made a bargain and sale of the reversion to the plaintiff on the 7th May, (30. *Eliz.*) on which the plaintiff declared in waste against the tenant, as being enrolled (within six months according to the statute) in *C. B.*

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T. Pasch. of that year. The defendant confessed the seisin of her lessor, and the lease to her, and pleaded that after the 7th May, and *before the bargain and sale was enrolled*, the bargainor 15 *Pasch.* in the same year, levied a fine to the plaintiff and his heirs, after which fine levied, the deed was enrolled in C. B., and that the defendant had never attorned: to which the plaintiff demurred. The whole case turned on the question, whether the actual time of the enrolment could be shewn to be after the fine, both being stated on the record to be Easter Term. For, if it was not after the fine, or could not be so shewn to be, the bargainee was in under the statute of uses, without attornment, and so could maintain waste; but if in by the fine, then attornment was necessary. The Court held that the deed after enrolment hath generally relation back to the delivery, so as to avoid *mesne* estates made to a stranger by the bargainor, but not so as to divest the estate settled in the interim by the fine in the bargainee himself; which made him in, in the *per*. There arose a question whether the true time could be averred. It was objected that it could not, because both must be taken to refer to the same time, namely the first day of the term, and was to be tried by the record, and not put in issue, as a matter *in pais* to be tried by the jury, and that it would be dangerous, as it might come after a long time when witnesses were dead. But the whole Court held that although the presumption was that the enrolment was in Easter Term, and on the first day of it, yet that it was but a presumption by fiction of law, and the precise time might be averred by any who had an interest to do so, and the true time here was *agreed by the parties, being confessed by the demurrer*. The averment, it was admitted, could not be made against a record, but this was in that case deemed to extend only to the enrolment, and not to the time of it.

It is to be remarked in the first place, that this case occurred seventeen years after the erection of the enrolment office in 16 *Eliz.* and no notice is taken of it. The particular day was either not generally inserted then

in the registry and certificate, or had been omitted in this case; or if inserted, it did not appear in the pleadings, and had not been relied on by the plaintiff as an estoppel. An estoppel may be waived, and is waived when it may be, and is not relied on in the record, by the party entitled to the benefit of it; here the plaintiff declared on the deed, as enrolled generally within six months and made *profert* of it. The defendant confessed such an enrolment, but said that it did not pass the estate, because before it was in fact made, the bargainee had the estate in himself by a higher species of assurance, so that there was no seisin in the bargainor out of which the use could arise. True, the defendant could not by plea to the country, deny the enrolment; and it may also be true, that he would not by such plea, after 16 *Eliz.* have been permitted to aver the time different from that stated in the declaration, and there stated *as by the enrolment appearing*. But the plaintiff did not so declare, nor did he supply that defect by a replication, that the enrolment was before, or at the same time with the fine, *as by the enrolment and the record of the fine appearing*. On the contrary he demurred, and thereby admitted the fact as pleaded, insisting generally that he had made legal and conclusive proof of the true time upon the presumption that it was on the first day of the term. This the Court held otherwise, because his own demurrer admitted that in this case, the presumption was false.

The decision seems to be in point here. The particular matter ruled in it is, that even when the party can insist upon a particular fact, by relying on the evidence of it as an estoppel, yet if he will not so rely, but admit upon the record, that the fact is otherwise, the court must proceed upon the truth; and where the admission is of the fact of enrolment, at a particular day, different from that presumed *prima facie*, whereby the deed is ineffectual in law, it shall be so held. The same consequence must follow when the party's own proof shows the day of the enrolment to be not within the time prescribed, as if that appeared on the enrolment, or if that be silent, upon other evidence. The

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farthest any case has gone is, that if the enrolment appear to be right, and in due time, and the party rely upon the record as establishing the facts, by way of estoppel, and doth not leave it at large, by such pleading as puts the real time in issue, nor confess it on the record, the court will not bear evidence against the matter appearing on the enrolment. Such was the case of *Garrick* v. *Williams*; which being a motion in which there could be no pleadings, the grantee had a right to rely on the estoppel, as it arose upon the evidence. But if the enrolment had itself shown, that contrary to the legal presumption, that it was made on the day marked on the memorial, as that on which it was left in the office, it was in truth, enrolled after the expiration of twenty days, the decision must have been that it was not duly enrolled, and was void. That is the very case we are considering. This registry purports to be made after the six months. Upon the principle of the last case, and the rule said to have been adopted upon the course of the office after 16 *Eliz.* the plaintiff could not aver the contrary. Upon that I give no opinion. He does not attempt it, but insists that though not purporting to be made, nor in fact, made within six months, but afterwards, it is nevertheless as good as if it had been thus made. To that there is no authority, and the words of the statute are clear, direct, express and positive against it.

There is no room for construction: nothing in the act from which an intent can be collected, as distinguished from the import of the penal words, which embrace every case without exception. Indeed the very thing which according to the statute, avoids the deed, is the act—registration within a particular period—to which the officer alone is, and the party is not competent. I have had occasion before to remark and I now repeat, that in my opinion the unreasonableness, hardship, or injustice of a statute cannot, where the words are plain, and denote unequivocally a settled intention, authorize the judicial repeal of it, under the name of interpretation. Here the terms are not obscure, nor the sense doubtful, but as plain as language can make it, and there-

fore they admit of no control by way of exposition.—There can be but one possible exception. As against the Register himself, a delivery to him might perhaps, be a registration. But as to third persons, they are not charged with the duty of performing any act touching the registry, and therefore cannot be affected by any omissions on the part of the plaintiff, or the officer.

Thus thinking I concur that the judgment of the Superior Court shall be reversed, and a *venire de novo* awarded.

PER CURIAM.—JUDGMENT REVERSED.

RICHARD FELTON v. DUNCAN McDONALD.

To prove a mis-description in a license to a coasting vessel, the license itself should be produced—a mistake in that part of the enrolment which recites a description contained in a former enrolment is not evidence of a similar mistake in the license.

CASE in which the plaintiff declared against the defendant, the collector of the port of Edenton, for so carelessly making out a coasting license of the plaintiffs sloop *Martha Jane*, that by reason of a mis-description, she was seized by the collector of Key West, and the plaintiff put to great costs and charges in defending her.

PLEA—*not guilty*.

The mistake alleged to have been committed by the defendant in the licence, was in describing the vessel to be a schooner, when in fact she was a sloop, and to prove this, the plaintiff offered, 1st. a certified copy of the certificate of enrolment, in which the vessel was described, "as having been built at &c. in the year &c. as appears "by a certificate of enrolment issued at Elizabeth City "on &c. now surrendered on account of a change of "property; and the said certificate of enrolment having "certified the said vessel has one deck and *two masts*, "and that her length is &c. that she was a square stern-"ed sloop, has &c. and the said R. F. having agreed to "the description and admeasurement above specified &c.

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"the said sloop has been duly enrolled at the port of "Edenton."

2d. A letter of the defendant to the collector of Key West, informing the latter, that the plaintiff had stated the *Martha Jane* to have been seized "in consequence of some informality in the papers issued at this office," and that "on examining the counter-part of the enrolment "and licence, nothing improper appears on the face of "them, unless I may have called her a schooner instead "of a sloop, if so it is a mistake of my own, and no im-"proper conduct, either of the master or owner." The licence not being produced, nor its absence accounted for, his Honor, Judge MARTIN thinking that no evidence of the mistake had been given, directed a nonsuit to be entered, and the plaintiff appealed.

Devereux for the plaintiff.

Iredell contra.

GASTON, Judge.—We are of opinion that the nonsuit in this case was properly directed. The gravamen of the plaintiffs action, is that the defendant, collector of the customs for the port of Edenton, in issuing a coasting *license* to the plaintiff for his vessel the *Martha Jane*, had made an erroneous description, by reason whereof she had been seized by the officers of the customs at Key West, and the plaintiff thereby damnified. In support of the allegation that the defendant had committed this error, the first testimony offered by the plaintiff was a copy of the certificate of *enrolment* granted at the same time with the license. This enrolment purports to be made in lieu of an enrolment formerly made at Elizabeth City, the certificate whereof is surrendered, because of a change of property. The certificate produced states that in the certificate surrendered, the vessel is described as a square sterned *Sloop*, with one deck, and two masts, that *Richard Felton*, the present owner agrees to that description as correct, and that the said *Sloop* is now enrolled at the Port of Edenton. The error is that she had *one* mast, and not *two* masts. The plaintiff did not offer in evidence the license, nor any copy of the license, which he averred to contain this erroneous des-

cription, nor the surrendered certificate of enrolment, nor a copy thereof from which it might appear whether the same had, or had not been faithfully recited in the new certificate of enrolment.

Had the case stopped here, the propriety of the non-suit could scarcely have been disputed. The plaintiff complains of a mistake committed by the defendant in making out the *license*, but does not shew that license, nor a copy of it, nor account for the non-production of a copy. Withholding this testimony, he calls upon the jury to presume, that because there was a mistake in the certificate of enrolment, *therefore* there was the same mistake in the license issued at the same time. Whether this inference could be made if the license itself and all traces of it had been lost, it is unnecessary to enquire, but it was inadmissible in this case, because well-founded *proof* to establish it directly was attainable by the plaintiff. Then to shew that this supposed mistake was committed *by the defendant*, he relies upon his certificate, reciting a former certificate issued by an officer of the customs at another port, in which recited certificate the error appears, and setting forth that the plaintiff agrees to the description as therein recited. This *per se* not only furnishes no evidence of a mistake made *by the defendant*, but repels such an inference. It must be taken as true until the contrary appears.

The only other testimony offered as to a mistake by the defendant in making out the license, was a letter of the defendant to the officer of the customs at Key-West, on hearing from the Captain of the *Martha Jane* that she had been detained, because of some alleged irregularity in her papers. He expresses his surprise at this information, and his inability to conjecture what the irregularity can be. He adds, that possibly she may be called on those papers a *Schooner*, and not a *Sloop*, and that if this be the case then the mistake was his. How she is called in the *license*, the plaintiff does not shew, but in the certificate of enrolment she is termed a *Sloop*, and not a *Schooner*. There is then no evidence that the case which the defendant supposed possible had occurred.

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Of the weight of evidence, the jury have the exclusive cognizance. But there must be evidence for them to *weigh*, and whether any competent evidence has been offered of a disputed fact, it is within the particular province of the Court to determine. We concur with the judge who presided at the trial, in the opinion that none such was produced, to establish the essential averment that the mistake complained of in the license, was made by the defendant.

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN C. GREEN *v.* JOHN V. CAWTHORN.

Whenever a conversation between two persons is proper evidence in an action against others, it may be proved by either, or both of the parties between whom it took place, as where A communicated to B a statement made to him by C, and upon his examination could not recollect its substance, C is a competent witness to prove it.

TRESPASS VI ET ARMIS, for an assault and battery. PLEA—*not guilty*.

On the trial before SETTLE, Judge at Warren, on the last Circuit, the plaintiff having made out his case, the defendant offered to prove, in mitigation of damages, that the plaintiff had used very reproachful language of him, which had been communicated to him but a few minutes before the assault. This evidence was objected to by the plaintiff, but was received by the Judge. The defendant then called one *Eaton*, who deposed that the plaintiff had used very abusive language of the defendant on that day—that he, the witness, had communicated the words spoken by the plaintiff to the defendant, about half an hour before the assault, and that at the same time he told the defendant of other abusive words, also spoken by the plaintiff of the defendant, and which had been communicated to him, *Eaton*, by one *Macon*. *Eaton* could not recollect all these last mentioned words, but swore that he had communicated to the defendant the very words which *Macon* had told him were used by

the plaintiff. The defendant then offered *Macon* to prove those words; but his Honor refused to admit the testimony unless *Eaton* was impeached, and the Counsel for the plaintiff disavowing any such intention it was rejected.

A verdict was returned for the plaintiff, and the defendant appealed.

Devereux for the defendant.

Badger and W. H. Haywood for the plaintiff, cited *Lee* v *Woolsey* (19 *John Rep.* 319) *Avery* v *Ray* (1 *Mass. Rep.* 12.)

GASTON, Judge.—The ground on which the case places the rejection of the testimony of the witness *Macon*, seems to us not tenable. The defendant was endeavoring to prove a communication made to him, of certain offensive remarks of the plaintiff. If this fact were one proper and material for his defence, he had a right to establish it by any of the means which the law allows for the ascertainment of truth. He might prove the fact, and all the particulars of it, directly by the person who made the communication to him, or by any other person cognisant of, and recollecting it—or he might establish it by testimony of other facts, from which the inference of the controverted facts could fairly arise, or having proved it in part and in some of its particulars by one witness, he might supply the defect in this proof either by the direct testimony of another witness as to the omitted part, or by such indirect and presumptive evidence as warranted an inference of the existence of that omitted. *Eaton* had testified that he communicated to the defendant all the offensive terms which *Macon* told him had been used concerning the defendant by the plaintiff; that this was done when *Macon's* communication was fresh in his memory; that he now recollected a part only of what he had thus heard, and thus communicated to the defendant, and was unable to state, for he had forgotten the residue. *Macon's* offered testimony was to supply this chasm in the testimony of the former witness. Had he been permitted to state that part of his communication to *Eaton* which *Eaton* could not recollect, but which he was

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positive was made known to the defendant, then the jury would have had proof as to the whole of the matter communicated to the defendant—that is, full testimony as to part by *Eaton*, and proof by the testimony of *Eaton* and *Macon* united, as to the other part. How far the accuracy of either, or of both, could be relied upon, was of course a question wholly for the jury.

In an action for an assault and battery, all the circumstances accompanying the transaction, are admissible in mitigation of damages; but it is otherwise of words spoken by either party, at a different time.

But we are nevertheless, of opinion, that no error was committed by the rejection of the testimony, because the fact sought to be established by it was not admissible, either in mitigation of damages or as explanatory of the transaction. On the subject of damages the jury have a very extensive discretion, and while the law is anxious that they should possess the materials for a full exercise of this discretion, it is sedulous to keep from them what is ordinarily calculated to distract their attention, and to mislead their judgment. The law also desires to confine evidence to the matters put in issue by the pleadings, and which, the parties may be presumed to come prepared to investigate. The rule adopted and handed down to us as fitted to accomplish these ends, is, to permit all the circumstances accompanying and forming a part of the transaction, to be laid before the jury.—These give a character to the act, and aid in ascertaining the nature and extent of an injury, which is very much modified by circumstances, and which it it is always very difficult to estimate with precision; and as the parties come prepared to investigate the transaction itself, neither can complain of surprise by testimony of circumstances passing at the time, and forming a part of the transaction. But antecedent matters of provocation not immediately connected with the assault itself, are rather calculated to turn the attention of the jury from the proper question, the nature of the injury complained of and its adequate compensation, to a vague inquiry into the reciprocal wrongs of the parties, in which they can have no guide but capricious and ever varying opinion, which are not put in issue by the pleadings, which the parties are not prepared to investigate, and which never can be fully investigated without an indefinite and

unlimited inquisition into the prior conduct of each of the parties in relation to the other. We believe the rule a wise one; but be it wise or unwise, we find it existing as a rule of law, and it is our duty to uphold it. The provocation which the defendant wanted to show passed half an hour before the assault, did not immediately lead to it, and cannot be considered as a part of the transaction which was then under the investigation of the jury. The evidence of *Eaton* which was objected to by the plaintiff, would probably not have been admitted, had the Judge understood that it related to a matter so disconnected in act, and so remote in time from the assault, as by his statement it appeared to be. But at all events, after its objectionable character was manifested, the Judge acted right in refusing to continue and extend an irrelevant, and therefore improper enquiry.

It is the opinion of this Court, that there is no error in the judgment of the Court below, and that it must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

THE GOVERNOR *upon the relation of* BENJAMIN G. BARKER,

v.

NEIL MUNROE, *et al.*

The act of 1777, (*Rev. ch.* 115, § 16,) authorises the Sheriff to dispense with a bail bond upon executing mesne process; but he thereby becomes special bail, and the non-payment of the amount with which he may be fixed, is a breach of his official bond: and the act of 1810, (*Rev. ch.* 800,) limiting the time within which actions may be brought upon Sheriff's bonds, does not protect his sureties until six years after final judgment against him as bail.

This was an action of DEBT, upon the official bond of *John Black*, former Sheriff of Cumberland.

The breach assigned, was, that *Black*, while Sheriff, had become the bail of one *Stephenson*, by omitting to take a bail bond from him when arrested at the instance

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of the relator, and had neglected to render the body of *Stephenson* in his discharge as bail, or to pay the money in which he, *Stephenson*, had been condemned to the relator.

The defendants after *oyer*, pleaded performance of the condition of their bond, and the act of 1710, (*Rev. ch.* 800.) limiting the time within which actions shall be brought upon sheriff's bonds, to six years.

On the last circuit at Cumberland, the cause was submitted to SEAWELL, Judge, on a case presenting the following facts:

The term of *Black's* office commenced on the 9th of March 1826, when the bond bore date. In November following, the writ at the instance of the relator against *Stephenson*, came to his hands, which was executed by him, and no bail taken. Judgment in that action was entered in March 1827, in favor of the relator, and a *ca. sa.* was issued, returnable to September term following, which was in in all respects regular, but on which was indorsed as follows: "The Sheriff will collect costs only." This writ was returned "*non est inventus.*" At March term, 1829, of the County Court, a *scire facias* against *Black*, as the bail of *Stephenson*, was returned, and final judgment was rendered thereon at September term 1832, by which he was fixed with the amount of the debt and costs due the relator. The writ in this case was issued the 22d of May, 1833.

At the request of the counsel below his Honor upon these facts, *pro forma*, gave judgment for the defendants, and the relator appealed.

Henry & W. H. Haywood, for the plaintiff.

Badger, contra,

GASTON, Judge.—The right of the plaintiff to recover upon the facts agreed, is resisted on three grounds.

In the first place, it is insisted that the defendants were sureties for the official conduct of the sheriff for the year 1826, and that his refusal to surrender the body of *Stephenson*, or to pay the condemnation money adjudged against *Stephenson*, when the same was demanded many

years afterwards, was not a breach of *that* bond. Secondly, that if a breach was committed of the condition of that bond, action was not brought against the defendant within six years thereafter, as required by the act of 1810. And thirdly, that no demand had been made of their principal, to render the body of *Stephenson*, or pay the condemnation money, in as much as a writ of *capias ad satisfaciendum* to take the body of *Stephenson* for the satisfaction of that condemnation money, was not issued or returned, as the law requires, before the *sci. fa.* sued out against their principal. The two first questions may be considered together, for the decision of the one necessarily involves the determination of the other.

The act of 1777, (*Rev. ch.* 115, § 16,) directs the sheriff, whenever a writ of *capias ad respondendum* shall come to his hands, to take from the defendant a bond with two sufficient sureties, in double the sum for which the defendant shall be held in arrest, and to return such bond with the writ; and declares that, in case the sheriff shall fail to take such bail, *he* shall be deemed and stand as special bail, and the plaintiff may proceed to judgment according to the rules thereinafter prescribed. Upon this statute a construction early obtained, that the sheriff had a right to become thus special bail in every case, and this construction has been ever since steadily adhered to, and followed out to its necessary consequences. We cannot now permit ourselves to question the propriety of this construction, but feel bound to consider it as settled, and as carrying with it the results which are legitimately to be deduced from it. We hold it therefore to be the law, that the sheriff commits no breach of duty by failure to take a bail bond; that by returning the writ executed without a bail bond, he becomes bail for the defendant, is liable to all the obligations, and clothed with all the rights of such; that this engagement is made by, and binding on him in his official character; that this engagement is not violated until he fail to pay the condemnation money, or surrender the defendant, (his principal) upon a lawful demand, and that those who are bound as sureties for his official acts are

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responsible for this violation. (*Swepson* v. *Whitaker*, 1 *Hay.* 224. *Tuton* v. *Sheriff of Wake*, *Ib.* 485, and *Governor* v. *Jones*, 2 *Hawks*, 359).

The cases of *Swepson* v *Whitaker*, (1 *Hay*, 224) *Tuton* v *Sheriff of Wake*, (*Ib.* 485,) and *The Governor* v *Jones* (2 *Hawks*, 359) approved.

The condition of the bond, "well and truly to execute the duties of his office during his continuance therein," is broken whenever an official act commenced during his term of office, and imposing upon him a *continuing* duty, shall fail of consummation by his default, at whatever time such default may happen. An ordinary instance of this is when an execution has come to his hands while in office, and the money been received by virtue of it after his term, had expired. There can be no question that the condition of his bond is broken by the non-payment of the money so collected. (*Governor* v. *Eastwood*, *ante* 1st *vol. p.* 157). Thus, also it was held in the case of *Fitz* v. *Hawkins*, (2 *Hawks*, 394) that the sureties on the official bond of the sheriff, executed in May 1820, were responsible for the non-payment of those taxes which, by law, he could not begin to collect until April, 1821, and which he was not bound to pay over until October, 1821. The *office* is regarded as continuing *quoad* any official obligation imposed or commenced during his term, until such obligation shall be completely performed or extinguished. We are of opinion then, that the sureties for the year 1826, were responsible for the engagement of their principal as bail, officially contracted during the year 1826, and that no breach of this engagement took place until the failure of their principal to surrender the body of *Stephenson*, or to pay the condemnation money, when he was thereunto afterwards lawfully required.

The cases of the *Governor* v *Eastwood*, (*ante* 1 *vol. p.* 157,) and *Fitts* v *Hawkins*, (2 *Hawks*, 394,) approved.

The remaining question is, has the bail of *Stephenson* been legally required to surrender his body, or to pay the condemnation money? The act of 1777, before referred to, enacts that all bail, taken according to the directions of that act, shall be deemed held and taken to be special bail, and as such, liable to the recovery of the plaintiff, but the plaintiff shall not take out execution against such bail until an execution be first returned, that the defendant is not to be found in his proper coun-

ty, and until a *scire facias* hath been made known to the bail, and this the *scire facias* shall not issue until such execution hath been so returned. After the judgment was obtained in the original action against *Stephenson*, a *capias ad satisfaciendum*, formal and regular in all respects upon its face, did issue to the sheriff of the proper county, and was by him returned "not to be found." But on this execution was indorsed a direction 'the sheriff will collect costs only.' It is insisted by the defendants that this endorsement must be viewed as constituting a part of the execution, as much so as though it had been inserted in the writ, and that if it had been so inserted the writ would have been senseless, and necessarily nugatory. Such does not appear to us the effect of this endorsement. A writ of high efficacy, the import of which has been settled from remote antiquity, imposing well known duties, and followed by well known and important consequences, is not to be annulled, or modified by a mere memorandum, accompanying or endorsed upon it. This endorsement could be regarded by the sheriff as no more than a personal instruction from the plaintiff, or his attorney, that the sheriff should forbear from executing the writ provided the costs were paid. The sheriff might probably, because of this instruction, have excused himself, if the costs had been paid, from proceeding to execute the writ.—Unquestionably however, the writ was a valid writ.—It conferred *full power* to take and to hold the defendants body for the satisfaction of the judgment. Had the body been *taken*, the bail would have been discharged. Had the body been taken and the prisoner discharged by the plaintiff, such discharge would have operated as satisfaction of the judgment. It being an execution which authorised the sheriff to take the body of the defendant, and the sheriff having made return thereon, that he could not find the body, all has been done which the law required as preliminary to the issuing of the *sci. fa.*

Although the jury have returned their verdict subject to the opinion of the court upon a case agreed be-

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tween the parties, yet that verdict has not found, nor the case agreed stated, what judgment was to be rendered in the event of the law being, upon the facts agreed, in favor of the plaintiff.

This court can therefore do no more than reverse the judgment below, and order a new trial.

PER CURIAM.—JUDGMENT REVERSED.

JAMES CROW v. JAMES HOLLAND *et al.*

A grantor cannot, under the act of 1798, (*Taylor's Revisal, Appendix, page* 193,) maintain a *scire facias* to repeal a grant for the same land, when the latter is older than the grant to him.

A grant can only be repealed at the suit of the State, or of a prior grantee.

This was a PETITION and *Scire Facias* to vacate a grant which issued to the ancestor of the defendants for land in Haywood, on the 5th of December, 1798. The petition set forth many instances of alleged fraud and false suggestion, and the cause was much litigated in the court below. Judgment was entered on the Spring circuit of 1830, that the grant which issued to the ancestors of the defendants, be vacated—from which, an appeal was taken to this court.

As the cause was decided upon a point not noticed in the court below, the only fact which it is necessary to state is, that the plaintiff claimed title to the land covered by the grant to the ancestor of the defendants, under a grant which issued subsequent to the 5th of December, 1798.

The case was argued at a former term by *Gaston*, for the defendants, and by *Badger*, for the plaintiff; and again at the last term, by *Winston*, for the defendants, and by *Badger*, for the plaintiff.

DANIEL, Judge.—This is a Petition and *Scire Facias*, under the act of 1798 *ch.* 7, to vacate a patent granted

by the State to *James Holland* deceased. The petition is filed by, and the *scire facias* sued out in the name of the plaintiff, who had obtained a subsequent patent for the same lands, and who suggests that the patent to *Holland* had been obtained by fraud and false suggestion, in violation of the laws prescribing the manner of entering, surveying and patenting lands.

Several grounds of defence have been taken, and among them there is one which is now for the first time, we believe, presented for adjudication in this State, and which as well on account of the principles which it involves, as of its extensive application, deserves to be fully and deliberately considered.

It is objected, that a *scire facias* to reverse or vacate a patent can never be sued out by a younger, against an elder patentee. Cases have occurred, in which the question might have been raised. In *Tyrrel* v. *Manney*, (2 *Murp.* 375,) and *Tyrrell* v. *Logan*, (3 *Hawks* 319,) junior patentees unsuccessfully attempted to vacate elder patents, and in *Greenlee* v. *Tate*, (*ante* 1st *vol. page* 300,) a junior patentee succeeded in such an attempt, but in none of them was this point made or considered. We much regret that it was not, as probably some inconvenience has resulted to the community from its having been formerly overlooked.

In England, the writ of *scire facias* to vacate a patent issues from the Common Law side of the Court of Chancery, where the patent is enrolled, and is there adjudicated, unless the pleadings terminate in an issue or issues of fact. If they do, then the pleadings are made up in the Rolls Office, and the record sent into the Court of King's Bench, to be tried by a jury, where on a verdict had, the judgment is rendered, (1 *Mad. C. P.* 4. 5.) As the office of the Secretary of State, where patents for land are enrolled, is an establishment distinct from any of the courts of justice in this State, and as it is a rule of law that a *scire facias*, founded upon any record, must issue from, and be returnable into the court where the record is, legislation became necessary to give jurisdiction to the courts, on disputed questions relative to

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the obtaining of patents for lands. The Legislature therefore passed the act of 1798, (*Taylor's Rev. Appendix,*) for that purpose, which act directs a copy of the grant from the Secretary's office to be filed in the office of the clerk of the Superior Court of Law, with a petition by the plaintiff, by way of suggestion when he brings suit, whereupon the writ of *scire facias* issues, calling upon the defendant to show cause why the grant should not be vacated. The proceeding is a Common Law proceeding on the *scire facias*, and the defence should be at Common Law, and not as in Equity.

On reading the act of 1798, it appears that the first eight sections contemplate only the establishment of a Court of Patents, to be held in the city of Raleigh, and the regulation of proceedings therein. The State only had a right to bring suits in that court by way of *scire facias*, to try the validity of grants. The ninth section of the act gave a concurrent jurisdiction with the Court of Patents, to the Superior Courts of Law of all grants and patents issued since the 4th day of July, 1776, for lands situated in the respective districts of such Superior Courts. The tenth section declares that when any person claiming title to land under a grant from the King, Lords Proprietors, or from the State of North-Carolina, shall consider himself aggrieved by any grant or patent, issued since the 4th day of July, 1776, to any person or persons against law, such person so *aggrieved* may file his petition in the Superior Court of Law, with a copy of the patent, whereupon a *scire facias* shall issue to the patentee, or person, owner or claimant under such grant, to show cause why the patent should not be vacated.

Did the Legislature, when it passed the act of 1798, suppose that a junior patentee could be *aggrieved*, because the State had been imposed on or defrauded by an elder patentee? Was not the tenth section enacted for the benefit of those persons who held patents from the King, Lords Proprietors, or the State and should be *aggrieved* by their titles being clouded, or endangered by a colour of title which might be set up, under a junior grant for the same land, obtained since the 4th day of July, 1776?

In the English books, there are many cases, where a *scire facias* has been brought by the elder patentee to vacate the junior patent, and decrees and judgments rendered accordingly; but we have not been able to find a single adjudication to vacate a patent on a *scire facias*, in favor of a junior, against an elder patentee. In the case of *Bassett* v. *The Corporation of Torrington*, (*Dyer*, 276 *a*,) the court *decided* that the last patentee could not bring a *scire facias* to vacate the eldest. The court said—"it is contrary to the books of precedents, and the common course." This decision was made at Trinity Term, 10 *Eliz.* by the Master of the Rolls, assisted by two Judges. There are *dicta* to the contrary of this decision, but no adjudication as we can learn.

The case in *Jenkins Centuries* (*page* 126,) was a *scire facias* by the first against the second patentee, to repeal the second patent, and the court held that if the first patentee be ousted, he might at his election bring an assize, or a *scire facias*, if the patent be for lands, or for an office for life. The compiler, (a man of admitted ability,) adds a note at the foot of this case, in which he says, "regularly the law is as aforesaid, but the younger patentee may have it against the elder." To support what he has said in this note, he cites *Dyer* 133, 198, and 14 *E. IV.* 3. We have examined the cases in *Dyer*: the first is *Daniel's* case, which was a *scire facias*, brought by the second patentee, to reverse an elder patent to *Daniel*, on account of some irregularity; but it does not appear that any judgment in the case was ever rendered by the court. The second case cited, does not support the principle laid down in Judge *Jenkin's* note; for the *scire facias* there, was by the elder patentee to vacate the younger patent. The case in the year book, (14 *E.* 4, 3,) we are unable to get, but if it supported the position for which it is cited, it would have been referred to in the subsequent case of *Basset* v *Torrington*, where the question came directly before the court. It is not cited in that case, therefore we conclude it is not a case in point. In *Jackson* v *Lawton*, (10 *John.* 23.) the only point for the decision of the court was, whether an

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elder patent could be set aside in an action of ejectment brought by the second patentee, on the ground of a mistake in the issuing of it. The court determined that it could not, but in delivering the judgment of the court, Judge *Kent* expresses his opinion that the elder patent may, by *scire facias*, be set aside at the instance of the junior patentee. The question now discussed was not argued by the counsel in that cause, and the opinion is avowedly extra-judicial. On examining the books referred to by the learned judge, there is not to be found an adjudged case either in this country, or in England, to support his position. The judge remarks that it would be difficult to assign a good reason why the second patentee should not have the writ. It seems to us that legal reasons of great weight not only may be urged, but have been urged under the sanction of high judicial authority, in opposition to such a course. In the case of *Overton's Lessee* v *Campbell & Lackney*, (5 *Hay.* 206,) the learned judge *Haywood* remarks that "the second patentee cannot have the *scire facias*, because he is not prejudiced by the first grant when it issued, and because the right to bring a real action is not transferred by the second grant without a special recital." In a case nearly analogous, it was observed by an eminent judge in Pennsylvania, (4 *Dal.* 204, 5, "that innumerable mischiefs, and endless confusion would ensue from individuals taking upon themselves to judge when warrants, and surveys, and grants were to have validity." In the case of *Dodson* v *Cooke & Stuart*, (1 *Ten. Rep.* 314,) it was decided after full argument, that "a subsequent grantee cannot avoid a prior grant for fraud, misrepresentation or deception in the grantee, because that deception did not operate to his prejudice, having then no right to be prejudiced. *Res inter alios non nocet.*"— In England, we must consider the question as at rest. In 4th *Coke's Institute*, (*page* 88,) we are told that the writ of *scire facias* to repeal letters patent, doth lie in three cases: 1st. when the King, by his letters patent, doth grant by several letters patent, one and the self same thing to several persons, the *former* patentee shall

have a *scire facias* to repeal the second patent. 2dly. Where the King doth grant any thing upon a false suggestion, the KING by his prerogative, *jure regio*, may have a *sci. fa.* to repeal his own grant. 3dly. When the King doth grant any thing which by law he cannot grant, he (the KING) *jure regio*, may have a *sci. fa.* to repeal his own letters patent. Baron *Comyns* lays down the law thus (*Comyn's Digest, Patent F*, 4, 5). "If the King grant by his letters patent the same thing to several persons, a *scire facias* lies for repealing the second patent; and in such case, the *scire facias* shall be brought by the first patentee. A *scire facias* by the *last* patentee should *not* be allowed, though he seems to have the right with him. If the King grants the same thing to divers by two several patents, the *second patentee cannot* have a *scire facias* against *the first*." The learned and correct *Sergt. Williams*, in his note to *2d Saunders*, (*page 72 p.*) lays it down—"If the King by his letters patent grants the same thing to two persons, *the first patentee* may have a *scire facias* to repeal the *second* patent, but the *second patentee* cannot bring a *scire facias* though the better right should be in him." Explaining the *first* part of this position, he adds, "where a patent is granted *to the prejudice of another*, he may have a *scire facias* to repel it at the King's suit; as if a market or fair be granted to the annoyance and prejudice of an *ancient* market or fair of another, in this case, the King is of right to permit the person *prejudiced* by the patent, upon petition to use *his* name for the repeal of it in a *scire facias*, at the King's suit to prevent multiplicity of actions upon the case which will lie, notwithstanding such void patent. And indeed it has been holden, that the person *prejudiced* by the patent may upon the enrollment of it in Chancery, have a *scire facias* to repeal it as well as the King."

Considering these authorities as decisive—satisfied that it is the established rule of the Common Law, that no one is prejudiced by the King's grant but he who had a prior grant for, or an ancient vested right in, the same thing—that no other subject could have a *scire facias* to repeal the King's grant—that in all other cases the *scire fa-*

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cias must be brought by the King, *jure regio*, himself to repeal his own grant—it seems to us demonstrable on examining the whole act of 1798, that this broad, ancient, wise, and well established distinction, is observed and kept up by the General Assembly. The remedy is for the State, where the State has been defrauded, and a *scire facias* may also be sued out by an individual, when such individual is *aggrieved*. "*Aggrieved*," in the language of our Legislature, is synonymous with "*prejudiced*" in the text books. This idea, if it could receive confirmation, is strengthened by the words used in the tenth section, setting forth *who* may be aggrieved, and *how* such injury may arise. "When any person or persons claiming titles to lands in this State, under a grant or patent *from the King of Great Britain*, any of the *Lords Proprietors of North-Carolina*, or from the State of North-Carolina, shall consider himself or themselves aggrieved by any grant or patent made since the 4th of July, 1776, &c." The two first classes of cases cannot include any but elder patentees aggrieved by younger patents; and the third class must be construed as applying to such as, like those embraced in the first and second classes, are entitled to the *like remedy*, because they suffer the like grievance—that is to say, they are prejudiced, or in danger of being prejudiced, by a grant to another of the lands previously granted to them. If this point had ever been distinctly brought to the notice of the court, and had received a different determination, we would hesitate long before we consent to change the rule.—But as we understand the previous cases, this is the first time the question has been stirred. We therefore feel the less reluctance in delivering this opinion, satisfied that it is consonant to the will of the Legislature, in conformity to fundamental principles, and conducive to the security of titles, and the repose of the community.

Judgment is to be reversed, and judgment to be rendered for the defendants with costs.

PER CURIAM.—JUDGMENT REVERSED.*

* Two other cases, viz: *John Bradley* v *Joshua Souther*, from Rutherford, and *Samuel Greenlee* v *Samuel C. Tate*, from Burke, which were, as to the dates of the several grants, similar to the above stated case, were also decided upon the same grounds.

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THOMAS FOSTER v. JAMES FROST.

An insensible condition to a bond renders it single; but unmeaning words in the condition shall be rejected, so as to give the obligor the benefit of it. As where a forthcoming bond, dated in April, was for the delivery of the property the 15th Friday before May Court, the figures were rejected, and the County Court having a term in May, the delivery was held to be on the Friday before the ensuing term of that Court.

DEBT upon a bond, for the payment of two thousand dollars, dated April 8th 1829.

Upon *oyer*, the condition was as follows:

"Whereas the said *Thomas Foster*, deputy sheriff, hath "levied an execution at the instance of *Wales & Erwin*, on "certain property of *John Cooke*, consisting of one ne- "gro, named, &c. [seven in all,] which said property, "at the request of the said *John Cook* and *James Frost*, "is left in their own care and possession until the same "shall be sold. Now, if the said *James Frost* shall well "and truly deliver the said property hereinbefore enu- "merated, to the said *Thomas Foster* deputy sheriff, at "Mocksville, on or before the 15 Friday before May "court without damage or further hindrance, then &c.

PLEAS—1*st*. *Non est factum*. 2d. *Performance*.

The plaintiff then replied, taking issue upon the first plea, and seting out as a breach of the condition, the non-delivery of the slaves at Mocksville, on the Friday before May Term, 1829, of Rowan County Court.—REJOINDER, taking issue as to this breach. At the trial before NORWOOD, Judge, at Rowan, on the last circuit, the plaintiff having made out a *prima facie* case, in order to strengthen it, produced a bill of sale made by one *Richard J. Cooke* to the defendant, whereby two of the negroes were conveyed to the defendant, with the following defeasance. "The condition of the above obligation is "such that whereas the aforesaid *James Frost* having be- "come surety for the delivery of seven negroes on &c. at "&c. levied on as the property of *John Cook*, and the said "*Frost* having given up to the above bounden *R. J. Cook* the "above mentioned seven negroes to make the money by "that time. Now if the said *Cook* shall well and truly

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"pay off said execution without further damage, then &c." The defendant objected to this bond or bill of sale, going to the jury, but his objection was overruled by his Honor.

The defendant then insisted that the bond declared on was void, because of the uncertainty for the time of the delivery of the slaves. But his Honor overruled the objection.

In order to reduce the damages to a nominal sum, or at most to the amount of the sheriff's commissions, the defendant then proved that the judgment in favor of *Wales & Erwin*, had been entered up in the Superior Court of Iredell, and that at the time when it was so entered, the defendant *Cook* prayed an appeal to the Supreme Court, and gave *Samuel King* and *James M. Morrison*, as sureties to the appeal bond. (*Vide ante* 2 *vol. pages* 183 & 341,) that the appeal not having been carried up in time, the execution under which the seizure had been made, and the delivery bond executed, had issued from the Superior Court of Iredell; that afterwards *Cook* had obtained a *certiorari* to that court, upon the same bond, and that the judgment below had been affirmed. That after the execution of the bond declared on, the debt and costs, as well as the costs of the Supreme Court, had been satisfied under process, issuing from that court. The plaintiff in reply to this evidence, proved very clearly that the amount thus paid, had been advanced by two persons not parties to the judgment, at the instance of *King* and *Morrison*, the sureties, and that an assignment of the judgment and execution had been taken by those persons in trust for them.

His Honor instructed the jury, that the plaintiff was entitled to recover such damages as he had subjected himself to in consequence of his having levied on property sufficient to satisfy the judgment, and that the money advanced at the instance of the sureties, not being intended as a satisfaction, but the judgment and execution having been assigned to strangers in trust for them, the amount of damages to which the plaintiff was entitled, was not thereby reduced.

A verdict being returned in favor of the plaintiff, for

the amount of the judgment against *Cook*, including the costs and interest, the defendant appealed.

Pearson, for the defendant.

Nash, for the plaintiff.

GASTON, Judge.—The plaintiff declared against the defendant in debt upon his bond, and after *oyer* of the obligation and condition, the defendant pleaded the general issue, and also performance of the condition, whereupon the plaintiff assigned a breach, and upon this assignment issue was also joined. Upon the trial of these issues the defendant objected that the condition was insensible, and the obligation therefore void; which objection the court overruled. We are of opinion that in this the court decided correctly. Were the condition insensible, the consequence would be, not to make the bond void, but to make it a bond without condition. But the condition was sensible, and could well be understood, and any words by which the intent of the parties can appear, are sufficient to make a condition of an obligation. The condition is inserted for the benefit of the obligor, and to enable him to save himself from the penalty. If the words of a condition however improper, should be pronounced senseless, then might the penalty be enforced against the obligor notwithstanding he had fully executed the condition according to the intention of the parties. (*Butler* v. *Wigge*, 1 *Saun.* 65: *Cromwell* v. *Grumsden*, 1 *Ld. Ray*, 335.) Any uncertainty or mistake therefore in the condition may be supplied and corrected by a reasonable intendment, and words which by themselves have no distinct meaning, and which serve but to perplex and embarrass the meaning of the residue of the condition, should be altogether rejected. (*Holmes* v. *Ivy*, 2 *Show.* 16. *Maulevever* v. *Hawxby*, 2 *Saun.* 78.) Let these rules be applied to the construction of the instrument in question. It is executed in Rowan county, is payable to the plaintiff as deputy sheriff of that county, and is dated on the 8th of April 1829. The condition recites that the said deputy sheriff hath levied an execution at the instance

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of *Wales* and others on certain personal property of the obligor *Cook*, which at the request of the said *Cook* and his co-obligor, the defendant, has been left in their care and possession until the day of sale. After this recital it proceeds to declare, "that if the said *Frost* shall deliver the said property to the said deputy sheriff, at *Mocksville*, on or before 15 Friday before May court, then the above obligation shall be void, but otherwise in force." The word fifteen, or rather the figures 15, standing by themselves, convey no definite meaning. They cannot without absurdity and absolute nonsense qualify the succeeding words "Friday before May court," for but six Fridays could intervene before that court. We are bound judicially to know when the the terms of our courts are held because these are fixed by the public law. It is the May term of Rowan county, that is referred to in the condition, for the bond is executed in that county, is payable to an officer of that county, and to secure the re-delivery to him of goods levied on for the purpose of a public sale in that county. And it must be the May Term of Rowan *county*, and not of Rowan *Superior* court that is meant, because the county court is held in May, and the Superior court is not. Let the figures 15 then, be rejected as by themselves unmeaning, and when connected with others which are intelligible, producing nothing but absurdity, and we see distinctly on the face of the condition, that its design is to afford the obligors an opportunity of discharging themselves from the penalty, by a re-delivery to the officer of the property, on or before the Friday preceding the next May Term of Rowan County Court.

Notice is judicially taken of the time when the County and Superior Courts commence.

We also approve of the instruction which the judge gave to the jury on the subject of damages. If an officer levy an execution on goods of a defendant, sufficient to satisfy the judgment of a plaintiff, the property in those goods, for the purpose of satisfying that judgment is vested in him, and if he permit the same to be eloigned so as to defeat the execution, it is not to be questioned but that he thereby becomes debtor to the plaintiff for the amount of the judgment. The act of 1807, (*Rev. ch.*

A sheriff who has seised property sufficient to satisfy an execution, and surrendered it upon receiving a forthcoming bond, is entitled upon a breach of the bond, to recover the amount of the

731,) allows an officer when property is levied on, and permitted by him to remain with the possessor until the day of sale, to take a bond for the forthcoming thereof, to answer the execution, but declares that the officer shall nevertheless remain liable as theretofore in all respects, to the claims of the plaintiff. Of course an action cannot be brought on this bond until there be a breach. But when there is such a breach, the damages ought to be commensurate to the injury sustained, and surely the value of his property thus withheld—the amount of the *debt* or *liability* thereby thrown upon him, is as definite and capable of being measured before, as after he shall have paid this *price*, or satisfied this *debt* to another. When a mayhem or a battery is committed, the doctor's bill is a proper item to be regarded by the jury in the estimate of damages, although it may remain undischarged at the moment of the trial. Damages comprehend the immediate injury, and the direct, obvious and ordinary consequences of it. And for all these the injured person is entitled to recover in an action for the wrongful act or omission, because they are its necessary results.

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judgment; although he may not have paid it to the plaintiff in the execution.

We see no ground for reversing the judgment, because of the admission in evidence of the conditional bill of sale or bond, (whatever it may be termed,) executed by *Cook* to the defendant, in which *Cook* acknowledges to have received from the defendant the negroes levied on in order to *pay off* the execution, and thus discharge the delivery bond. It must be regarded at least in as strong a light as a declaration of facts made to the defendant, and by him admitted to be true. It is therefore competent evidence against the defendant, if the facts which it declares, or tends to establish be relevant. These facts are relevant, because from them it appears that the defendant had disabled himself from performing the stipulations in the condition, by a delivery of the property to *Cook* for the purpose of being sold, and upon an engagement of *Cook*, and adequate security from him to pay off the judgment, for the satisfaction of which this property had been seized. It has been objected that this testimony may have been injurious to the defendant, because

A conveyance by a stranger to the defendant, indemnify him against loss by reason of the action, is admissable against him, especially if it recites facts material to the issue, being similar to a declaration made in his presence, and not contradicted.

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it shewed that he had the means of indemnity against recovery by the plaintiff. But it is impossible that this objection can be well founded, unless we presume that the jury should be reckless of their obligations, or wholly destitute of intelligence. The most that can be said against proof of such facts in the present case is, that it was unnecessary, for the performance of the condition was to be shewn by the defendant, and was not required to be established by the plaintiff. But the exhibition of evidence *merely* superfluous and unnecessary, and which cannot mislead the jury, furnishes no legal cause for exception.

An advance of money made by a stranger for a judgment, upon an assignment of it to him, is not a satisfaction of it. The cases of *Carter* v *Sheriff of Halifax*, (1 *Hawks* 483,) *Governor* v *Griffin*, (*ante* 2 *vol. p.* 352,) *Hodges* v *Armstrong*, (*ante p.* 253,) *Sherwood* v *Collier*, (*Ib.* 380,) approved.

Upon the remaining question raised by the defendant it is enough to say that after the decisions in *Carter* v *Sheriff of Halifax*, (1 *Hawks* 483,) *Governor* v *Griffin*, (*ante* 2 *vol. p.* 352,) *Hodges* v *Armstrong* (*ante* 3 *vol. p.* 253,) and *Sherrod* v *Collier*, (*Ib.* 380,) it is hopeless to contend that an advance of money upon, and assignment to a third person of the judgment against *Cook*, purposely made to keep that judgment alive for the use of his sureties, did or could operate to *extinguish* such judgment at law. The whole argument of the defendant upon this point is founded on the assumption that this judgment has been paid. But no part of the judgment has been paid or satisfied. The monies received by the plaintiff, were the consideration for an *equitable* transfer of his interest therein to the assignee. The judgment itself is wholly unaffected by such transfer, and remains since, as it was before, *in law*, the judgment of him in whose name it was obtained. The whole of the evidence in relation to this equitable transfer, and the consideration advanced upon it, was irrelevant in this case, and should not have been admitted. But having been received the Court very properly instructed the jury that it did not affect the plaintiffs right to recover, or the amount of that recovery.

We see no error in the judgment below, and direct it to be affirmed.

PER CURIAM—JUDGMENT AFFIRMED.

ALECIA REDMOND *et al.* v. JOSIAH COLLINS *et. al.*

Where a will giving the executors power to sell land, and directing them to pay the interest of the personalty to a married woman for her life, and after her death to divide the whole, and the rents of the land between her children was propounded by the executors, and upon the *caveat* of her husband was rejected, the sentence is conclusive both upon her infant children then in being, and those born afterwards.

This was a petition originally filed in the County Court of Edgecomb against the defendant *Collins* alone. The plaintiffs stated that *Francis Perie* died in the year 1810, having duly made and published his last will, whereof he appointed *Bennet Barrow* and *James Southerland* executors. That the testator left *Elizabeth Redmond*, the mother of the plaintiffs, his only child. That the said will was offered for probate by the executors at the May term 1810 of the County court of Edgecomb, when a *caveat* to its probate was entered by *Daniel Redmond*, the father of the plantiffs, which was tried *instanter*, "when by some unaccountable infatuation or "corruption of the jury empannelled to try the same, or "by some fraudulent combination between the said exe-"cutors and the said *Daniel Redmond*," the issue was found against the executors, although both the due execution of the will, and the sanity of the testator were proved by the clearest testimony. That the plaintiffs having no one to protect their interest, and the executors fraudulently refusing to appeal, the judgment upon the verdict remained unreversed, and as a consequence of this judgment, administration upon the estate of the defendant was committed to *Daniel Redmond*, who wasted the whole of the personalty, which was very valuable and together with his wife *Elizabeth* above mentioned, conveyed a part of the land of which her father died seized, to the defendant.

The prayer was for process against the defendant, and for a re-probate of the will.

A copy of the will was attached, the material parts of which are as follows:

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"My will and desire is, that my houses and lots, together with my plantation, be rented out at the discretion of my executors for the term of eighteen years, the said houses, lots, and plantation to be sold by my executors at public sale on a credit of twelve months.

"My will and desire is that my executors pay to my daughter *Elizabeth Redmond*, yearly, all the interest that may accrue upon the whole of my estate in their hands, exclusive of the value of my houses and lots and plantation, until the term of eighteen years."

"My will and desire is, that my executors shall hold all the residue of my estate in their hands for the term eighteen years, at the end of which said term of eighteen years, my will and desire is that two-thirds of the estate, including the houses, lots, and plantation, and all other things so remaining in the hands of my executors, shall be equally divided, or belong to the lawful heir or heirs of her body begotten, which my said daughter *Elizabeth* may have at the expiration of the said term of eighteen years, and the balance of one third is to be retained in the hands of my executors during the natural life of my said daughter *Elizabeth*.—The said executors paying her yearly all the interest that may accrue on the said balance of one-third until her death, at which time, if she shall have living another child or children, which of course will be after the first division of two thirds of my estate, my will and desire is, that the last child or children shall have all the balance of the one-third of my estate remaining in the hands of my executors at the death of my daughter, and in case there is no increase of my daughter after the first division of two-thirds, that the balance of one third shall descend in the same manner as the first two-thirds.

By an amendment made at a term subsequent to the filing of the petition, *Bennet Barrow* and *James Southerland*, the executors were made defendants.

The defendant *Collins* in his answer denied that the verdict against the supposed will was the result of corruption in the jury, or of a fraudulent combination between the

executors and *Redmond* the father of the plaintiffs, and averred that he was a purchaser for value, and without notice. He also insisted that the sentence upon the *caveat* of *Redmond* was conclusive of the rights of the plaintiffs.

The answer of the executors unequivocally denied all fraud and all combination between them and *Redmond*; they stated that they procured respectable counsel to offer the will for probate, and furnished him with testimony which they were advised was sufficient to establish it, and that the issue was found against them in consequence of some mistake made by the jury, and not from corrupt motives. They admitted that they were dissatisfied with the verdict but declined taking an appeal as the matter bid fair to be extensively litigated, and they had no fund from which they could be indemnified in case of failure, in which event they were advised they would be liable to pay them. The County Court directed the will to be propounded anew, and the defendants appealed.

On the Spring Circuit of 1833, the cause was submitted to his Honor Judge MARTIN, upon the petitions and answers, together with a statement of facts which set forth the death of *Porie*—the propounding of the will for probate—the result of the trial, and the terms of the will as stated in the petition. The case also stated that at the time of that trial, the plaintiff *Alecia* was in being, but was an infant of very tender years, and that the other plaintiffs were the children of *Daniel* and *Elizabeth Redmond*, born since the trial, but before the expiration of eighteen years from the death of *Porie*. That *Alecia* came of full age a few months before the filing of the petition, and that the other plaintiffs were still infants.—That the verdict was probably wrong, owing to a misapprehension of the nature of the issue, but was not the result of any combination between the executors and *Redmond*, or of a fraud on the part of the former. That one *William Ross* had purchased a part of the real estate of which the testator died seized, from *Redmond* and his wife, and had sold it to the defendant *Collins*, who was a purchaser for value, and within notice of any de-

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fect in the title of his vendor, and had been many years in possession.

His Honor dismissed the petition, and the plaintiffs appealed.

The case was argued at the last term at great length, by *Hogg, Devereux, and Mordecai* for the plaintiffs, and by *Badger* for the defendant *Collins*, and was continued under advisement until this term.

RUFFIN, Chief-Justice.—This is an application by petition, to prove a paper as the will of *Francis Porie*, deceased. It is made by persons who claim an interest under the paper, as legatees and devisees. It comes before this Court on appeal from the decision of the Superior Court dismissing the petition, and the questions here arise on the pleadings, and a case agreed by the parties in the record.

This is not an original application. It is stated in the petition that *Barrow* and *Southerland* named in the paper as the executors, did in that character offer the same paper for probate in 1810, to which *Daniel Redmond*, the father of the petitioners, and the husband of *Elizabeth*, the only child of *Porie*, entered a *caveat*. That thereupon an issue of *devisavit vel non* was made up, on which the jury found, that the paper was not the last will and testament of the party deceased, upon which the Court pronounced against the paper as a will, and granted administration to *Redmond*, the caveator. The petitioners allege that the verdict was the result of some unaccountable infatuation or corruption of the jury, or of a fraudulent combination and contrivance between the executors and *Redmond*, and they found the charges on the circumstances, that the *factum* of the will, and the sanity of *Porie* were indubitably proved, and that the executors neglected to appeal.

The paper is exhibited and contains the following provisions—"my will is that my houses and lots, together with my plantation be rented out by my executors for eighteen years, and then to be sold by my executors." The profits of the whole, except the real estate to be paid

to his daughter by his executors for that term. The paper then goes on, "my will further is, that my executors shall hold all the residue of my estate in their hands for the said term of eighteen years, and at the end thereof my will is that two thirds of the estate, including the houses, lots, plantation and other things so remaining in the hands of my executors, shall be equally divided or belong to the heir or heirs of her body, which my said daughter may have at that time, and the other third to be retained by my executors during the life of my daughter for her use, and at her death to go to such children as she may then have," in certain proportions.

Redmond disposed of all the personal estate, (which was a large one,) to persons unknown, and he and his wife conveyed the lands in fee, and they have since come by purchase, for valuable consideration, to *Josiah Collins*, who is in possession claiming title. It is admitted in the case agreed, that he had no notice of any defect of title when he purchased.

The petitioners are the only children of *Mrs. Redmond*, of whom one was born and of very tender years, at the former trial, and the other soon afterwards, and this proceeding was instituted soon after their coming to full age. Both their father and mother are dead.

The prayer is that the paper may now be admitted to probate, and that a copy of the petition may be issued to *Collins*, and he required to answer, and afterwards it was amended by having copies served on the executors, and calling for an answer from them.

The answer of *Collins* states the circumstances of his purchase, as already mentioned. Those of the executors explain the details of the trial, and admit that the verdict was in their opinion erroneous, but they deny any fraud on their part, and state that they employed respectable counsel and offered all the necessary proof, and under advice did not consider themselves bound to appeal, and incur the risk of costs without any interest of their own.

The case was argued at the bar upon the footing that the executors were bound to appeal, after having under-

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taken the office, and that their neglect in that respect was a distinct ground of fraud or *laches*, on which this application ought to be sustained. The court is certainly not satisfied with the correctness of that conclusion, if the premises were admitted. The misconduct of the executors might subject them, in the proper court, to the demand of those whose rights as legatees, had been prejudiced by their errors, omissions or frauds. That would be upon the idea, that the effect of such errors, omission or fraud, was a sentence upon the will itself, by which those rights were lost. But that sentence itself, as between the parties to it, or considering it as a proceeding *in rem*, as to those bound by the thing done, can be impeached only on the ground of *collusion* between those charged with taking care of the interests of the applicants, and the opposite party. What rule the court might feel it necessary to adopt in such a case of collusion—playing into each others hands—it would be premature now to mention. In the case before us, it would be deemed clear by us on the proofs, that there is nothing like it, and probably we might conclude in like manner, that the *laches* of the executors in not appealing was not fraudulent, that is *mala fide*, to abandon the legatees, but arose from a misapprehension of their duty and of their personal liability for costs. But we do not enter into those enquiries at all, because the record contains a statement of facts on which the Superior Court decided, and which is inserted in the record as a "*case agreed on by the parties*," for this court. In that it is expressly stated that the finding of the jury was probably wrong, owing to a misapprehension by the jury of the nature of the issue, but was *not* the result of any combination between the executors and *Redmond*, or of fraud on the part of the executors. The trial was therefore fair, and the executors kept back none of the proper proofs. They made a case on which the paper ought, as they then said, and as the petitioners now say, to have been pronounced a good will. The error was that of the tribunal, and not that of the parties. The case is therefore now to be considered as one, in which the legatee

A mistake in a verdict in the County Court, finding against a proposed will, without collusion between the executors and the caveator, is no reason for permitting it to be repropounded by a legatee, altho' the result would have been different, had the exetors appealed.

AN erroneous verdict and sentence against a

propounds the will a second time, and asks his allegation to be sustained and admitted to proof, upon the sole ground that the former verdict and sentence was in itself wrong. It does not appear indeed what were the proofs offered before, nor can it be expected according to our mode of proceeding by jury trial, upon *viva voce* testimony, that it should easily be made thus to appear. But, it must be taken, that no new proofs are to be offered, because there is neither a case made, that proofs then existing were held back by the executors, or that other proofs have since been discovered by the present parties. The application then is to the same Court of probate, which formerly pronounced against the will, now to pronounce in favor of it upon the same evidence, or to open the case for evidence at large, without shewing that such evidence was not before given, or could not then have been given.

will cannot be set aside in the court of probate, except on an allegation and proof of newly discovered testimony.

In whatever tribunal such an application shall be made, whether of law, of equity, or of ordinary, it must be rejected upon one general principle of universal and necessary application, that there must be an end of litigation, and that where the *same case* has been once appropriately and judicially examined and decided, the decision is conclusive.

The case before the Court it is contended is without that principle, because the persons now propounding the will, were not parties to that proceeding, and their interests ought not to be bound by the judgment.

The question is somewhat novel in the Courts of this State, but much of its difficulty has been removed by the researches of the counsel on both sides, into the adjudications of the Courts of probate, from which the idea of our own has been derived, and the course of proceeding, and principles of action adopted by those Courts.— These have all been considered by the Court, assisted by the arguments of real ability offered at the bar. The summary of the doctrine touching those peculiar jurisdictions, is that they proceed according to the civil law.— Their action is *in rem*, and hence when a matter is not within their jurisdiction, their sentence is void, and when

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within it, it is conclusive upon other courts, and upon all persons until vacated in the Court itself which passed it. But as every judicatory having any pretensions to administer a code of law so as to make it practically a just system, having respect to the rights of persons in the thing, these tribunals do not hold those bound by the sentence, who had no notice of the pendency of the proceedings on which it was pronounced. At the instance of one thus situated and concerned in interest, the former decree is called in, and the matter again taken *sub judice*. Proceeding *in rem*, it has peculiar modes by which persons are to be affected with notice, or may contest an application before it may be made, or may become parties, as we express it, at common law. When a will is offered for probate *an allegation* in writing is exhibited, stating the will, the circumstances of the party deceased, the *factum* of the will, the intention that it should be testamentary, its attestation, and all the proofs the persons propounding the allegation can, and expects to make. There are no parties made, that is, none stated in the allegation itself, on whom process is to be served, to constitute an adversary contest. If the case made in it be insufficient to establish the will, the opinion of the Court is expressed thereon in the first instance, and the allegation propounding the will is rejected. If it be sufficient, it is admitted to proof by sentence; and the person who put in the allegation is thereby allowed to examine the witnesses mentioned by him, to the points stated in the allegation, and if the proofs support the allegation, the decree is of course. To these proceedings no individual is necessarily a party but the person propounding the paper, nor is any bound conclusively by them, but those who are privy to them, that is, have knowledge of them either actual or presumed. But all may become parties and will be heard upon making an interest in themselves appear. To enable the propounder to bind others a decree is taken out by him authorising him to summon all persons, "to see proceedings," not to become parties, but to witness what is going on, and take sides if they think proper. If the propounder

A sentence for or against a will, is not binding on those who are not parties or privies.

But privies are those who claim through a party, or who have notice of the proceeding.

Probate in common form, is, where the next of kin have no notice.

does not chose to adopt that course, he may at once take his decree; which in relation to this subject is called proving the will in common form. If he take out a decree and summon those in interest against him, "to see proceedings" they are concluded, whether they appear and put in an allegation against the will or not, and as against those summoned this is called probate in solemn form.

Probate in solemn form, is, where they are cited to see the proceedings.

But besides these methods, there is another, by which persons may be heard and concluded. If the propounder will not take out a decree "to see proceedings," a person in interest is not bound to wait the result of that proceeding, and then prefer an allegation to call in the decree made on it, and asserting his own rights; but he may at once "intervene" by a counter allegation, because the proceeding is *in rem* and all shall be heard.—Upon which intervention each of the persons are of course bound by the sentence as before. But in none of these cases, is the sentence re-examinable at the instance of one who before propounded the allegation, or who intervened, or who was summoned to see proceedings, or who is represented in fact or in legal contemplation by one thus situated. Differing somewhat in the forms of proceeding, yet in substance these courts thus appear to act upon the same great fundamental principle of justice, which guides the courts of common law, in determining who shall or shall not be bound by their adjudications. The latter courts being courts of record, look only to the record for the parties, and the obligation of the judgment. The court of the ordinary is not a court of record, and therefore, in each case, the enquiry is open, who was, and was not privy to the proceedings. Privity is established by the allegation filed, whether of propounding or of intervening, and by the summons on file "to see proceedings". Thus far the privity is shewn by similar, though not by the same means. But the ecclesiastical courts take a further step, and allow the privity to be proved by the testimony of witnesses, or otherwise *in pais*.

Similar in its effect to the last is the case of intervention by the next of kin, although not cited.

In none of these cases can a sentence be re-examined at the instance of one who is a party or privy to it.

And this privity may be shown *dehors* the record by proof *in pais*.

The whole doctrine of probates was gone into upon the argument more at large than we deem it necessary

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to pursue it. It may be useful however, to advert to the observation, that probate in common form may be called in at any time according to the cases of *Satterthwaite* v. *Satterthwaite*, (3 *Phillim.* 1) and *Finucane* v. *Gayfere* (3 *Ib.* 405). Upon the principle of common justice before mentioned, this is generally true, because a probate in that form implies that there was no privity in the next of kin, and even the receipt of a legacy under the will by one of the next of kin will not in all cases, bar his right to call for a probate in solemn form. (*Core* v. *Spencer* in *Bell* v. *Armstrong* 1 *Add.* 365). But an acquiescence for a long time not accounted for, would bar him, either as implying a waiver of right, or notice of the former proceedings. (*Bell* v. *Armstrong*). And it is settled that one of the next of kin is barred from calling in a probate by being cognisant of a prior suit, in which the will was contested by others of the next of kin, though not himself an intervener, nor summoned to see proceedings. (*Newell* v. *Weeks*, 2 *Phillim* 224. *Wood* v. *Medley*, 1 *Hagg*, 645). The cases of *Dickerson* v. *Stewart* (1 *Mur.* 99.) *Moss* v. *Vincent* (2 *Car. Law Rep.* 414) and *Jeffreys* v. *Alston*, (*Ibid* 634) adopt the same principle here.

Probate in common form may ordinarily be revoked at the instance of the next of kin.

Because its form implies that they are not privy to it.

This presumption may be repelled by lapse of time, or notice of a contest between the executor and another of the next of kin.

But courts of probate act upon different principles in applications to revoke letters of administration, and repropound a will which has once been rejected.

But the case of a probate in common form, and the proceeding to call it in, is very different from, and has very little application to that of calling in administration, and of a second attempt to prove the same paper as a will. The proper solution of the latter question in our law, renders it necessary to consider the paper first as a testament, and then as a will. In each point of view, the present applicants appear to have an interest, in the first as legatees of a part of the personal estate, and in the latter as entitled either to the legal estate in the land as heirs of their mother, or as *cestui que trusts*, under the provisions of the will, of the proceeds of the sales of it. As a testament undoubtedly the executors themselves could not repropound the paper. First principles forbid that, since if they could the sentence would not be final in the court pronouncing it, for any purpose. It may be yielded that upon newly discovered evidence they might. If they could in that case, it woul-

be allowable only when applied for in due season, and under such circumstances as would induce a Court of Equity to order a verdict at law, obtained by fraud or surprise, to be set aside and the issue retried. The resort to equity is in that case rendered necessary by the inability of a court of law to reform its judgments after they are rendered. The ecclesiastical courts are not under that restraint, and therefore the parties affected need not apply to equity. But the principle on which equity relieves against a judgment is a sound one, and is the only one on which the ecclesiastical court can regulate its own discretion. Hence it seems agreed that upon facts *novita perveuta*, and only in that case, an executor might re-propound a will before pronounced against (*Wood* v *Medley*, 1 *Hagg.* 645.) The question is whether one claiming as legatee can do in this respect, what the executor himself cannot. It is laid down both by common law, and ecclesiastical authorities that the person alone by whom a testament can be proved is the executor named in it. (*Salk.* 309, *Swinb. Pt.* 6 §. 12,) and that he may be summoned by the Ordinary to produce the testament, prove it, and take on himself its execution, or refuse the same. This summons, the Ordinary will issue at the instance of any person having an interest, even a creditor of the party deceased, and much more one to whom a legacy is given in the paper, and it is required by one act of 1777, (*Rev. ch.* 114, § 52,) to be issued by the County Court. Doubtless if the executor renounce, any other person interested, may propound the will. Thus far the executors and legatees are viewed as persons having distinct rights and duties. But if the executor of his own accord, or on citation propound the paper himself as a testament, we find no case or principle which requires that the legatee shall also propound the paper, or intervene, or be cited, in order to make a sentence of rejection obligatory on him. Although not formally or apparently upon the files of the Court, personally privy to the proceedings, he is so substantially through the executors. The executor is called *pars principalis* or *legitimus contradictor* who is

This never is done at the instance of the executor who formerly propounded it, except in cases of fraud, surprise, or newly discovered testimony.

A legatee may propound a will when the executor renounces.

But the executor is both *pars principalis* and *legitimus contradictor*, and sentence against a

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will *bona fide* propounded by him, binds all persons interested under it, except under special circumstances.

bound and authorised to act for all persons entitled as legatees under the testament, nay in *Wood* v *Medley*, Sir *John Nicholl* said he was more. He was the person especially selected by the party deceased to carry his will into effect. In that case there were two papers, in one of which *Cundy* was named as executor, and in the other not; by the latter alone the interest arose to *Wood*. *Cundy* propounded both, and his allegation was rejected. Afterwards *Wood* propounded an allegation to call in the administration, on which the administrator appeared under protest, which was allowed to stand over, in order that the legatee might, on shewing that he was not cognisant of the former proceedings, bring in an allegation on the testament under which he claimed, because the two papers were distinct, and the legatees claimed under that in which no executor was named.—*Wood* then put in an allegation propounding both papers and praying probate to *Cundy*, which was not admitted to proof, but rejected on its own terms and the affidavits annexed. This was upon two grounds: the one, that although the interest of *Wood* arose on one of the papers only, yet he did not swear that the facts alledged by him were newly discovered, and that he believed he should make due proof of them, which had been the condition on which the allegation was admitted, without deciding on the protest. The other, that without proof of collusion, the legatee was bound by the former sentence upon those papers, when both of them were propounded by *Cundy*, then alleged, and also again in this proceeding, alleged to be the executor of both. The judge expresses a doubt whether considering the form in which the allegation is brought in, alleging *Cundy* to be executor, and probate to be made by him, he ought to consider any but the last point. But assuming that not to be law, he thinks the case for the administrator, because the affidavit was insufficient as to new discoveries, and because the facts alleged did not make the paper a will. But he lays down the doctrine generally in this case and in the previous one of *Colvin* v *Frazier*, (1 *Hagg* 107,) that the legatees are bound by the acts of the executor in respect to pro-

bate, unless there be collusion. What would be the effect of collusion upon the proceedings in that Court, or how the legatee could be redressed therefor,—whether in that Court, or in a Court of Equity—he does not then say: nor, as this is not a case of that sort, is it necessary we should say.

There is a privity between the executor, and legatees, and creditors, which causes the latter to be *prima facie* bound by the acts of the former in respect of proceedings to establish the testament, and obtain probate. By the appointment the executor takes in the first instance, the whole legal estate in the personal property. He is delegated by the testator to carry his will into effect, to guard the interest of his legatees, and especially those under disabilities, and of his creditors, against all other persons. He is therefore the *pars principalis* through whom all the others derive their interest, and who, in a controversy with third persons upon the validity of the instrument by which his office is constituted, and their interests conferred through him, he is a necessary, and the only necessary actor.—Hence he is deemed the legitimate allegator or contradictor, and all other persons are bound by his acts, as his is the primary interest, and theirs are dependant upon, and deduced from his. This is in truth, but another application of a well known principle both of Common law and of Equity. An executor is not obliged to plead the Statute of Limitations. He may confess judgment to creditors. The legatees are bound at law, and also in Equity, unless in the latter case they can shew the debt not to be due, and collusion between him and the pretended creditor. So the executor alone brings a bill for an equitable money demand of the testator, and is the only necessary party to a bill by creditors for an account of the assets; neither the particular nor the residuary legatee being required, although the amount of assets to satisfy them may be affected.—It may be taken then as the settled doctrine of the ecclesiastical courts, that unless under special circumstances the legatees though not intervening nor cited, are bound

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by a sentence rejecting a testament. They take benefit by a sentence pronouncing for the paper, and must submit to the consequences of a contrary one. No case is found, that infancy or coverture or non-residence, or that the legatee was even not *in esse*, are of themselves such special circumstances. It would be most unreasonable that it should be, for it would expose the administrator to successive attacks from each legatee as he came of age, or into being, and there would be no security for property bought under the warrant of an apparent legal authority, as an administration granted when there is a will, is void, and no title can be made under it. What might be the effect of a mere attempt of the executor *ex parte* to obtain probate in common form in our courts, which was not at first allowed, might admit of question, as respected either his own right to offer the testament a second time, or that of a legatee to summon him to do so. Our practice is so very informal, having no vestige on record of such an application, as to render it probable that the sentence would not be considered in itself definitive to any purpose. But we think clearly that a verdict and judgment upon an issue formally made up between the executor and one of the next of kin, upon which if found for the executor, the probate, as between those parties would be in solemn form, and settle the rights of the legatees under the will, is also when found against the paper, and without collusion, conclusive against the legatees, whether parties or not to the issue. Our statute which orders the issue and jury trial did not intend to alter the law in this respect. Under it the practice has been to dispense with the formal allegations in writing required by the Ordinary, and to make the allegation *ore tenus*, in general terms, and thereupon the Court directs an issue, upon which the whole matter is tried by the jury. Yet as before only a person in interest can be heard against the will, and all such persons may be bound either by making themselves parties, *nominatim* of record to the issue, or by being cited by either side, or by being duly represented. The proceeding was not intended to be strictly one at common law,

And neither infancy, coverture, non-residence, nor that the legatee was not *in esse*, are such circumstances.

It is probable that in this State a rejection of a will, when offered, *ex parte*, by the executor would neither bind him nor a legatee.

But it is otherwise of an issue formally made up between the executor and one of the next of kin, resulting in a sentence against the will.

The act of 1789, (*Rev. ch.* 308,) does not alter the law in these respects, but only directs a trial by jury, and a new mode of proof.

with its process, pleadings and judgment between parties. The sole object was to alter the mode of trial, substituting that of a jury with *viva voce* testimony as most approved, for the former one of written allegations and examination upon interrogatories, and a decision by a single judge. The next of kin may therefore yet require, if he was not cited, nor conusant of the proceedings, that a probate by the executor may be revoked, and a re-probate had. His right does not arise out of that of the executor, and therefore is not subordinate to it, but primary and in opposition to it. But a legatee is as it were, the *cestui que trust* of whom the executor is the trustee, and the trust goes with the legal title to which it is attached, the remedy of the *cestui que trust* being primarily against the trustee, and exclusively against him, unless there be collusion between him and the person in possession.

Merely as a testament, our opinion therefore is, that the rejection of this paper is, in the case stated and agreed, conclusive on the executor and the petitioner, in the Court of probate, as in other courts.

The applicants however, insist upon their rights in the real estate as entitling them to this relief, because as to the land, they are not represented by the executor as such. This is clearly correct at common law, for the Ordinary cannot take probate of a will of lands, and if he does, it does not operate to establish the will as a devise. It is insisted that our law has altered that, by giving that power to our Courts of probate, and it is argued by the counsel on both sides, that the grant of the power makes its exercise indispensable to render the devise effectual. From that position however very different and opposite conclusions are drawn by the respective counsel. Those opposed to this application contending that thereby the act of the executor becomes as binding on the devise, as it was before on the legatee; while those for the petitioners urge that they must have a right themselves to prove the will as to the devises, because they were not as to them, represented by the executor, and will therefore be condemned unheard.

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The court cannot concur in the opinion that devisees are concluded by the sentence against the will when propounded by the executor alone, without citation to, or intervention by the devisees. We do not think the relation between the executor and devisees, was intended to be altered in any important respects by our statute, any more than that pre-existing between the executor and the legatees, especially in the essential particular of concluding the devisee. But we do not on the other hand deem this the proper remedy of the devisee, nor think that he may as devisee, re-propound the paper both as a will and a testament, and ask probate thereof as such. We confess we should think so, if the devisee had no other redress. It is a sacred principle that every person must be heard either by himself, or through one legally representing him, before he shall be concluded in his rights. This principle is of such universal utility and application that it cannot safely be violated in any case. It must be respected whatever inconveniences may arise from it to third persons; but it may, and ought to be so respected, as to produce as little inconvenience to third persons as possible. The question as to the lands is between the devisees and the heir; to which the executor and the legatees are in no wise parties, nor can the executor meddle with the land at all. Papers to pass land and personalty are to be executed in different manners, and sustained by different proof, and they may be revoked by different means. Until 1784, wills of land were proved here, as in England, upon ejectments, or upon an issue out of Chancery. The statutes of that year, (*Rev. chs.* 204 *and* 225,) prescribe the ceremonies to make a good will of lands, as to their formal execution; and the previous acts of 1715, and 1777, (*Rev. chs.* 10, *and* 115,) having required wills to be proved and *deposited* in the County Courts of probate, the sixth section of the act of the second session of 1784 makes such probates, as well made before as those to be made thereafter, sufficient evidence of the devise of lands, and also attested copies evidence in the same manner as the originals, with a proviso that upon the suggestion of a fraud in the draw-

Devisees are not represented by the executor, and are not affected by a sentence against a will when propounded by him, unless they are parties to the proceeding.

But they cannot re-propound it, and demand probate of it as a will of land as well as chattels.

ing or obtaining it, or any irregularity in the execution or attestation, the original shall be produced. This act did not, we think, render the rejection of the paper as a will, when offered by the executor, more conclusive on the devisee, than its probate would be on the heir. As to the latter it is clear it is not conclusive, but must be again proved on the trial upon a proper suggestion, for as Judge *Haywood* asked in *Ward* v *Vickers*, (2 *Hay.* 164,) why is it to be produced but to enable the court and jury to decide whether the former probate was right. A proved will is therefore only *prima facie* evidence against the heir. So one not proved is not conclusive evidence against the devise. The act does not require wills for lands to be proven and recorded in order to pass the estate, as the statute of uses, or our act of 1718, (*Rev. ch. 7,*) does as to the enrolment and registration of deeds. A will is not pleaded as being proved and recorded, but only duly executed: the circumstances of probate and recording are alleged to dispense *prima facie*, with further proof, but not as constituting the validity of the instrument. A devisee it seems to us, may therefore yet bring his action of ejectment upon the will before probate or after the rejection of it at the instance of the executor, and establish the will on the trial, or in a proper case, prove it in Chancery as before the act of 1784. The object of that act was to ease the devisee in his proofs in ejectment. We should so think upon the words of the act; but no doubt is left in our minds when we consider the effects of an opposite construction. We set out with the principle that the devisee is not concluded by the act of the executor. If he be not, how is he to avoid the consequences of a refusal of probate to the executor. That is the question. It can only be in one of two ways; either to allow him to prove the will as at common law, or that at his mere pleasure, the former administration is to be annulled, and a reprobate had. In the latter case, the whole personal estate and its administration to creditors and next of kin, is thrown into confusion, and the greatest injustice done to persons who cannot, in any mode be heard in the

Their remedy is by proving it in an ejectment for the devised premises, which may be done when it has been rejected on the allegation of the executor, without notice to them.

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proceeding for re-probate. Besides there is a contradiction in the thing itself. A party claiming under the will cannot ask probate for himself, but for the executor only. Hence the executor would get by means of another person with whom he is in no privity, the very thing which he is precluded from asking for himself; this follows certainly as it seems to us. For the jurisdiction is, as it were *in rem*, and the probate is an entire thing, and cannot be set aside but *in toto*. Between these inconveniences the election is not difficult, and we are led without doubt, to choose that which is confined to those persons, whose interests alone are concerned in the pending contest, and which may thus be kept distinct from those of all others. For these reasons the Court cannot concur in the conclusion to which Judge *Haywood* arrived in his note to *Ward* v *Vickers*, and we agree in the judgment given by Judge *Johnston* in that case, though not precisely, as will be seen for his reasons. In support of the opinion entertained by us the case of *Henry* v *Ballard*, (2 *Law Repos.* 595,) is in point. The probate of the will in the County court was objected to, because the certificate did not state that it was proved to have been attested by two witnesses; but the will was thus proved on the trial of that action by two witnesses.—The Court held the will sufficiently proved, and admissible without reference to the certificate of the former probate.

The cases of *Ward* v *Vickers* (2 *Hay.* 164,) and *Henry* v *Ballard*, (2 *Law Repos.* 595,) approved.

The only doubt that can be raised upon this subject is suggested by the act of 1789, (*Rev. ch.* 308,) which gives the issue and jury trial in all cases, as well of the wills of land as of testaments. But we do not think that a serious one. It so far modifies the law as to allow the heir and devisee to be parties to that issue, and doubtless those who are parties to it are bound as in other cases. It is made a mixed proceeding, partly partaking of the nature of one before the Ordinary, and partly of an action of ejectment, or issue out of chancery. Persons may take benefit by it who are not strictly parties to it, and they make themselves parties by intervening, if the expression may be allowed, that is by

taking sides upon record, and they may be bound by being cited and not appearing, or by refusing to take either side upon appearance. Hence the principal effect of the act is to render unnecessary the resort by the devisee to a court of equity, because in most cases the will can be conclusively established against the heir by one trial at law. But if the heir cannot be cited to appear at law, or if as here the case is in such a state that the devisee cannot directly make up, at law, the issue of *devisavit vel non*, there seems to be no reason why he should not have the usual relief in equity to establish the will, while proof is in his power.

The question has been thus far considered in the most favorable manner for the petitioners; as if they were the devisees of the land. If that were the case we think they could not succeed in this application, because they would have another remedy more appropriate to that right, and exclusively against those claiming in opposition to it, and unattended by consequences to the prejudice of third persons.

Upon the will before the court, the petitioners are not devisees. It may be a question of some nicety whether the legal estate in the land is vested in the executors or trustees, or whether a power only is given to them, and that the land descended to the heir, Mrs. *Redmond*. We do not examine the point, because in either event it would not help the petitioners.

In an issue of *devisavit vel non*, under the act of 1789, the court cannot notice equitable interests in land devised in the will. It is sufficient if the devisee in trust, is a party.

If on the trial of that issue, the trustee betrays the interest of the *cestui que trust*, the remedy of the latter is in Equity.

Unquestionably a court of probate, as such cannot regard secondary equitable interests arising out of a legal estate in land given in a will, as distinct from the legal estate itself, for the purpose of determining whether the proper persons have had notice. The question before such a court is, whether the paper is duly executed to pass the legal estate. It has no concern with the trusts upon which it is given, or the construction of the will, which must be enforced in this, as in other respects, in another court. If the trustee has violated his trust by misapplying the estate, or refusing to establish the will, or colluding with the heir, the *cestui que trust* must seek his redress against him and the party colluding, where

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his own rights are recognised, and can be enforced.

If the land descended subject to a power, it is liable to the same observations. Those equitably entitled under the power must establish the will, and assert their equity as against the executors in chancery; where it may be, they may be compelled yet to execute the power, so as to try the legal title at law, or may be required to make good the loss to the petitioners, as the merits or demerits of their conduct may be made there to appear. But it would be absurd to say that the executor, whether the devisees of the land, or the depositories of a legal power, are not bound in respect either of their estate in, or authority over the land, by the verdict to which they were parties of record. If they are concluded, so we think upon all the principles applicable to trusts, the *cestui que trusts* must be as to all persons but the trustees themselves, and their confederates, in a court of equity, and as to all persons in every other court.

So when a power over land is created by the will, the depository of the power is the only actor in the court of probate,

And whenever the trustee or depository of a power is bound by the sentence of a court of probate; the *cestui que trust*, or the person interested under the power is, in that court, also bound.

The detail into which this discussion has gone, was deemed necessary from the novelty of the enquiries, and the extent to which the argument was carried at the bar. It is important that the subject of probate should be more generally understood, and particularly the effect of the rejection of a will, when offered by the executor, upon the rights of legatees and devisees respectively in our law, as modified by statutes. The Court has therefore thought it a duty to examine those questions minutely, that the grounds might be made plain, on which we feel bound to affirm the judgment of the Superior Court dismissing the petition.

PER CURIAM—JUDGMENT AFFIRMED.

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WILLIAM H. GOODMAN, *adm'r. of* LEMUEL GOODMAN,

v.

EDWIN SMITH, *adm'r of* HENRY COPELAND.

The fourth section of the act of 1789, *(Rev. ch.* 308,*)* barring creditors of a decedent, who do not bring their actions within two years after the qualification of the executor and administrator, is a defence as well to the next of kin, as the personal representative, and the latter in pleading it, need not aver that he has delivered the assets to the former, and taken refunding bonds.

This was an action of DEBT upon a single bond executed by the intestate of the defendant, to the intestate of the plaintiff, dated the 2d of January, 1817, and payable one year thereafter.

The defendant pleaded that the action was not commenced within two years of the time when letters of administration issued to him. The plea did not contain an averment that the defendant had handed the assets of his intestate to the next of kin, and taken refunding bonds.

On the trial at Gates, on the Fall circuit of 1829, before DANIEL Judge, the evidence upon the issue taken upon this plea, was, that the action was commenced on the 30th of March 1829, that letters of administration issued to the defendant at the November term of 1823, of Gates county court, that within two months thereafter he duly advertised his qualification as administrator at the Court-house, and at other public places in the county. The Superior court of Gates sits on the first Monday after the fourth Monday of March, and the proof of the advertisement being posted at the Court-house during the the term of that Court, next succeeding the grant of administration consisted of the fact that it was thus posted before Christmas 1823. Both the intestates resided in Gates county. It was contended by the counsel of the plaintiff that the plea and proof were defective, in that it was not averred or proved, that the defendant had paid over the assets in his hands to the next of kin of the intestate, and taken the refunding bonds required by the second section of the act of 1789; and also that there

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was no proof of the defendant having advertised at the *District* Court-house, during the term of the *District* Court next succeeding the grant of administration to him. His Honor ruled that it was not necessary for the defendant to aver or prove that he had paid the assets in his hands to the next of kin, and taken refunding bonds, and that since the passage of the act of 1806, establishing Superior courts in each county of the State, the advertisement required by the act of 1789 to be made at the District Court-house, at the Superior court next following the grant of administration, might be made at the Court-house of the county, during the next Superior court. His Honor left it to the jury to find whether there had been an advertisement at the Court-house in Gates county, during the Spring term 1824, of the Superior court, and a verdict being returned for the defendant, the plaintiff appealed.

Iredell for the plaintiff.

Badger for the defendant.

GASTON, Judge.—The principal question presented to our consideration in this case is, whether an executor or administrator can plead in bar of the action of a creditor, that he has not exhibited his demand within the time required by the fourth section of the act of 1789, *(Rev. ch.* 308,*)* without an averment that the defendant has paid over all the assets remaining in his hands to the legatees, or to the next of kin, and has taken from them refunding bonds for the benefit of creditors. as directed by the second section of the same act.

The plaintiff contends for the necessity of this averment, and argues that the second, third, fourth and fifth sections of this act are parts of an entire system devised for the purpose of securing to creditors the satisfaction of their just demands against the estates of deceased persons, and of providing a speedy and safe settlement between the representatives of such estates, and those entitled to the surplus after satisfaction of the creditors. That to carry this system into effectual execution it is indispensable that all the provisions contained in

these sections shall be construed with reference to each other, and that it is clearly to be collected from a construction thus made, that no protection was intended to be given to an executor or administrator against the demand of a creditor, unless he had performed the duty enjoined in the act of securing for the creditors the means of legal redress against the legatees, or next of kin of the deceased. The court is always solicitous to give to a statute such an interpretation as is best calculated to carry into effect the intention of the Legislature, and for the purpose of ascertaining the intent of any provision in a statute, it will attentively consider every other provision, not only of that statute, but of all the laws on the same subject. Being declarations of the legislative will in regard to the same matter, the meaning of imperfect or obscure expressions in one part of the law, may be frequently explained by reference to more exact or intelligible expressions in another part. But it is never to be forgotten that the words which profess to declare any *specific purpose* of the law-makers, are the ordinary *signs* by which that purpose is indicated, and that when these are clear and intelligible, it is exceedingly perilous to overrule their import by resorting to words elsewhere used, and bearing directly upon some other, and but indirectly on this specific purpose. The immediate text, if unambiguous, furnishes the surest means of explication, and cannot be controlled by a context not more certain than itself. Though the whole of the law relates to one subject, yet this subject has its integral parts, and confusion and perplexity must be the unavoidable result of an interference among these parts where a separate action is assigned them. The first section of the act of 1789, is preceeded by a preamble declaring its object to be the cure of those irregularities which had crept into practice, and of those precipitate and injurious decisions in relation to the probate of wills and granting letters of administration, that had arisen from the want of precision in the former laws, which directed the method of proceeding with respect to such probates and grants. In its enactments this section is entirely

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confined to the remedy of these evils, and is no further connected with the next, or with any other subsequent sections, than as all of them relate to the estates of deceased persons. The second section is preceded also by its appropriate preamble, from which we collect its purpose to be to speed creditors in the collection of their debts, and to facilitate the settlement of estates by executors or administrators. For this avowed purpose it directs that the executor or administrator, at the end of two years from his qualification, shall deliver over to the legatees, or next of kin entitled to distribution, whatever estate of the deceased may then remain in his hands, after deduction of his necessary charges and disbursements, and such debts as he shall have legally paid, taking bonds from those to whom such delivery over is made, with sufficient sureties, payable to the chairman of the Court and his successors, and conditioned to refund rateably what has been thus received, to the payment of any debt or debts of the deceased, which may be afterwards sued for and recovered, or otherwise duly made to appear; that these bonds shall enure to the sole use of the creditors, and that they shall have a *scire facias* against the obligors *in the manner* therein after directed. The fourth section has no preamble, and is evidently ancillary to the third, for it simply provides the manner in which this *scire facias* is to be had. It directs that the bonds so taken shall be returned to court, and made a record thereof, and that when an executor or administrator shall plead to the action of any creditor a full administration of the assets, or a want of assets to satisfy his claim, and such plea shall be found true, the creditor may ascertain his demand, and sign judgment, and then sue out a *scire facias* upon these refunding bonds, calling on the obligors to shew cause why execution should not issue against their proper goods and chattels, for the amount of the judgment thus signed. Thus far the system seems sufficiently distinct. The executor or administrator at the end of the two years is to settle with those who may be entitled to the estate, after satisfaction of, or subject to the satisfaction of the

creditors. On doing this he is to take refunding bonds for the benefit of creditors subsequently claiming, which he is to file in Court for their use, and which to that end become records of the Court. Thus delivering over the assets he may shew a complete administration against any creditor who shall thereafter sue him, and upon his shewing this, the creditor may ascertain his debt, have his judgment therefor, and sue out a *sci. fa.* upon these bonds to collect it. The executor has thus a simple and easy mode pointed out, by which he can settle the estate that has come to his hands, while an expeditious remedy is provided for the creditor against that property which ought to be liable to his demand.

The fourth section is introduced without preamble or recital. It enacts that the creditors of a deceased person residing within the State shall, within two years, and those residing out of the State shall, within three years from the qualification of the executor or administrator, make demand of their respective claims, and "if any creditor shall fail to demand and bring suit for the recovery of his debt, as above specified, within the time limited, he shall be forever debarred from the recovery of his debt in any Court of law and equity, or before any justice of the peace within the State." It has two provisos—the one excepting infants, *femes coverts*, &c. from the operation of this bar, provided they bring suit in one year after the removal of their respective disabilities—the other making an exception also for creditors delaying suit at the request of the executor or administrator. The fifth section is as evidently subsidiary to the fourth as the third was to the second. It begins with the preamble "and in order that all creditors may be *duly* apprised of the death of any person indebted,"—and then proceeds to make it the duty of every executor and administrator upon his qualification, to advertise in the mode therein pointed out, for all persons to bring in their claims agreeably to the foregoing directions. The propriety of considering these two last sections as intimately connected with each other, and as forming together one provision seems to us evident. The first of

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them makes the *laches* of a creditor in not preferring his claim within a prescribed time after the qualification of the executor or administrator, a bar to his recovery, while the other provides that the executor or administrator shall give the creditor public notice of such qualification. There is no such *laches* as the law contemplates, unless there be the notice which the law requires, and it would be obviously unreasonable for the executor to set up the delay of the creditor as a bar to his claim, when such delay may have been the consequence of his own omission of duty, in apprising him of the necessity to make his claim. The executor shall apprise the creditors of the time within which the claims must be preferred, and doing so he may plead this notification in bar to those creditors who shall disregard it.

But we perceive no such intimate connection between this part of the statute creating a bar against the recovery of the demands of defaulting creditors, and the former part making provision for the satisfaction of creditors who shall make recovery. We can see no cause why either shall be considered as depending upon, or regulating the other. They appear to us to be made *diverso intuitu*, and for different sets of creditors, the former for the benefit of the diligent, the latter for the punishment of the dilatory creditor. He whose claim is not barred, has a right to satisfaction out of the assets of his deceased debtor, against the executor, if in his hands, or not legally paid over to the legatees, and against the legatees, not the executor, if delivered over to them in the manner prescribed by the act. He whose claim is barred by his own default has lost all right to satisfaction from these assets, whether in the hands of the executor, or lawfully delivered over to the legatees. To free the executor from *personal* liability to the former, it is enough to shew that the assets have been delivered over, and refunding bonds taken. To *bar the action* of the latter it would seem to be sufficient to establish the *laches* which creates the bar. The successful creditor has no interest in the enquiry, whether

proper advertisement has been made to protect the estate against defaulting creditors, and the defaulting creditor has no interest in knowing whether adequate provision has been made for those who are not in default. The *former* cannot object to a plea of a proper administration of the assets, because advertisement has not been made for creditors to prefer their claims in due season, and the latter it would seem can as little object to the plea in bar, that refunding bonds had not been taken for those who are not barred.

It is insisted however on the part of the plaintiff, that the executor or administrator is not bound to deliver over the remaining assets in his hands, until the expiration of two years from the time of his qualification—that the same period is prescribed for the creditors within which to prefer their claims—that the bonds are to be for the benefit of the creditors who shall thereafter bring suits and recover, or whose debt shall be thereafter duly made to appear; and that these provisions shew that the bar spoken of in the fourth section is not properly a bar to the action of the plaintiff, but a personal defence to the executor or administrator. The language used by the legislature in declaring the effect of non-claim by the creditor, scarcely leaves room for construction. It is "that such creditor shall be forever debarred from the *recovery of his debt* in any court of law or equity."

It is scarcely possible to suppose that such terms could have been employed for the purpose of protecting an executor against personal liability who had faithfully administered the assets, and who by force of such administration was adequately protected, and therefore stood in no need of this additional shield. An exposition so inconsistent with the obvious import of the words employed, and leading to a result so nugatory, cannot be admitted unless it be supported by irresistible argument. Is that, which we are considering of this character? Two years is indeed the period at which the Legislature directs the representative of the deceased person, to deliver over to those entitled under his will, or by the law, whatever remains of the estate, after payment of the debts which

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have been duly demanded; and the same period is assigned for the creditors—inhabitants of the State, to make such demand. But infants, insane persons, and *femes covert* are at liberty to prefer their demands after this period. and until the end of one year from the termination of their disabilities. Persons without the State, though under no disability, have three years within which to claim and sue. The Legislature directs the executor and administrator to settle with those whose claims are next in order to the demands of creditors, at the time when in general these may, and ought to be satisfied. It protects him in doing so against such as may nevertheless be legally exhibited afterwards, while it secures to the creditors the means of payment, by requiring refunding bonds to be taken, and recorded for their benefit. It is well known that great doubts were once entertained by the profession, whether this fourth section of the act of 1789, did not constructively operate a repeal of the seventh section of the act of 1715, (*Rev. ch.* 10,) which forever barred *all* creditors of a deceased person, whether under disability or not under disability, whether bringing suit against the personal representatives, or against the heirs of the deceased, and whether advertisement had, or had not been published, by a failure to make claim for seven years after the death of the debtor. The Federal Circuit Court of this district, and the Supreme Court of the United States held, that the act of 1789, did repeal the act of 1715, while the courts of this State held that both might, and did stand in force. During this controversy which so perplexed the profession, and divided the tribunals of justice, this exposition of the fourth section shewing that in truth it created no *bar* to the creditor, but only gave a *personal* protection to the executor, that it prescribed no limitation to the action, but regulated the administration of the assets, was never urged, or as we believe, thought of. Had it been admitted to be correct, all pretence for a conflict between the acts would have been at an end. The old act would not only have been reconcilable with the new, but could not have been regarded as within the purview of the new act. The two acts would be then distinct actions of

legislative will upon different *cases*—the one barring the creditor not claiming within seven years, the other securing to him so claiming an appropriate remedy.

We concur therefore in the opinion of the judge who presided on the trial of this cause in the Superior Court that it was not necessary for the defendant to aver in his plea, and of course not necessary for him to prove on the trial, that he had delivered over the assets to the next of kin, and taken refunding bonds.

Advertisements required before the act of 1806, establishing Superior Courts in each county, to be made at the District Court houses, may now be made at the County Court houses.

Two other exceptions were taken by the plaintiff to the charge of the judge, and have been here assigned as errors. The last section of the act of 1789, requires besides other notice for the creditors to bring in their demands within the prescribed time, "to advertise at the district court-house, at the next district superior court of law and equity, held for the district in which such county *may* be." The judge determined that since the act of 1806, which substituted Superior courts of law and equity, for each county, in the lieu and stead of Superior courts for large districts, embracing several counties, an advertisement at the court-house of the county, at the next Superior court of law and equity for that county, was a compliance with this requisition. We see no ground for exception to this instruction. The district Superior court contemplated by the act, was that district Superior court which then existed. If a later law has abolished the courts at which the advertisement by an older law was required to be made, so as to render a compliance with that injunction *impossible*, this change of legislation removes the injunction. When the law imposes a duty, the citizen must obey—when a subsequent law renders the performance of this duty impossible, the Legislature releases the obligation. *Lex neminem cogit ad impossibilia.* The court however adopts the construction of the Judge below, that the effect of the general substitution by the Legislature, of County Superior courts, for district Superior courts, is to render the former the appropriate place for performing acts which were theretofore required to be done at the latter.

The remaining exception is to that part of the Judge's

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The Supreme Court cannot set aside a verdict, although in their opinion found upon slight testimony.

instruction which left it to the jury to decide upon the evidence of an advertisement at the Superior court, after the qualification of the defendant. The term of this court was on the first week after the fourth Monday of March 1824. The testimony offered was that of a witness, who declared that some time before Christmas 1823, he saw the advertisement at the court-house.—This testimony seems to us so slight, that unsupported by any other circumstances, we should have little hesitation in pronouncing it insufficient to warrant the conclusion of fact which the jury have drawn, were this a tribunal that had a right to set aside verdicts, because of a finding on insufficient proof. But this jurisdiction is exclusively given to the court below. No application can be made here for a new trial because of a verdict there against evidence, or without evidence, but solely for misdirection on a question of law. No specific instruction was prayed for on the subject of the admissibility, or of the effect of this evidence. To reverse the judgment we must see an error in law. The advertisement at the court-house, *four* months before the Superior court, was perhaps *some* evidence of an advertisement there at the court. It was evidence or not, and if evidence, weaker or stronger according to circumstances with which the jury was familiar, and which were no doubt known to *all* at the trial, but are not stated in the record—that is to say, accordingly as the advertisement was slightly or strongly attached to the court-house, was on the inside, or external wall of the building, whether the court-house was in a town, or in a thin neighborhood, was well or ill secured, or was much or little frequented in the vacations between the terms of the courts. Upon the whole, we do not feel ourselves authorised to say that there was *no* evidence to be left to the jury respecting the fact of an advertisement at the Superior court.—This exception therefore is also overruled.

As no sufficient reason has been shewn for reversing the judgment rendered below in favor of the defendant, we are of opinion that it should be affirmed with costs.

Per Curiam.—Judgment affirmed.

NEAL W. HORTON v. SAMUEL CHILD.

Where a partner executed a bond in the name of the firm, and upon being informed it did not bind his partners, took it back, and with the consent of the obligor, removed the seal, and re-delivered it with an intent to bind the company, it is effectual as their promissory note.

ASSUMPSIT, in which the plaintiff declared against the defendant, as a partner in the house of *William D. Murphey, & Co.* in two counts.

1st. Upon a promissory note, dated November 20th, 1829, payable at twelve months, for $251 75.

2d. For goods, wares and merchandise, sold and delivered.

PLEA—*Non assumpsit.*

On the trial before NORWOOD, Judge, at Orange, on the last circuit, the plaintiff produced in support of the first count of his declaration, an instrument signed by *William D. Murphey, & Co.* in all respects similar to that declared on, excepting that after the signature, it had a scrawl and the word "*seal*" written within it, which had been erased by drawing a pen through it; and adduced testimony tending to prove that *Murphey* had declared that he executed the instrument as a bond, not knowing that one partner could not bind the firm by deed, and that in order to obviate this objection he had drawn a pen through the word "*seal*" written within the scrawl, and had handed the instrument to the plaintiff as the promissory note of the company.

The proof upon the second count in the declaration, was perfectly clear.

For the defendant it was contended, 1st. That the instrument was a bond upon which this action could not be sustained; and that the question whether the instrument was a bond or a promissory note, was one which must be determined by the judge, upon inspection, and that parol proof could not alter its character.

2d. That if the instrument ever had been sealed, and the seal afterwards destroyed, the whole was annuled.

3d. That although the jury might believe that the goods had been bought by the copartnership, yet that

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the simple contract which arose therefrom had been merged in the specialty, and therefore this action could not be maintained.

His Honor declined deciding upon inspection, whether the instrument was a deed or not, but submitted that question, upon the evidence, to the jury, informing them that if they should find that the scrawl made on it, had originally been a seal, and that *Murphey* afterwards drew a pen through it, with an intent to destroy it as a bond, and then delivered it as the promissory note of the firm, it was valid as a note. He also informed them that if the goods were purchased by the firm, the several bond of *Murphey*, given for their price, did not merge the debt as to the copartnership.

A verdict was returned for the plaintiff, and the defendant appealed.

J. W. Norwood, for the plaintiff.

Nash, Winston & W. A. Graham, contra.

DANIEL, Judge.—After stating the case proceeded as follows :—If the instrument declared on in the first count, had originally been the bond of *Murphey*, and he had, with the consent of the plaintiff, taken off the seal, and then delivered the writing as a promissory note to pay a partnership debt, with the name of the firm signed to it, we can see no reason why it should not be good in law to bind all the partners of the firm. There is no evidence to shew that the plaintiff took the sole bond of *Murphey* in payment of, or as a complete discharge of the debt due from the firm—the circumstance of the name of the firm having been originally signed to the paper, negatives any inference that the plaintiff meant to look to *Murphey* alone, for the payment of the debt. Whether the instrument is in the form of a deed, is certainly a question of law, and must be decided by the court. Usually the court can determine by inspection, whether the instrument be, or be not a deed; but if it be doubtful whether that which hath the resemblance of a seal, be in truth such, or whether the seal has been destroyed, or if destroyed, whether such destruction was

Whether an instrument be a deed or not, is a question for the court; but whether it has, or has not been cancelled is for the jury.

designed or accidental, the judgment of the court must then depend on facts not discernible by inspection, and of course these facts must be found by the proper tribunal, the jury. Cancellation or destruction is an equivocal act, and depends on how much is done, and the *quo animo* with which it was done. There must be an act accompanied with an intention. If the intention be to destroy, and the whole act be done which was intended as an act of destruction, there is a cancellation or destruction, although a part of the thing remains. But if the act done, be not all that was intended to be done for that purpose, then is the attempted destruction wholly ineffectual. (*Windsor* v *Pratt*, 6 *Eng. C. L. R.* 299, *Den ex dem, Perkes* v *Perkes*, 5 *Ib.* 353, *Bibb* v *Thomas*, 2 *Black. Rep.* 1043.) The circumstance that the scrawl which surrounded the seal now appears untouched by the obliteration, did not in law prevent that act from being a destruction of the seal, and of course a cancellation of the bond of *Murphey*. Suppose in this case instead of a scrawl surrounding the word "*seal*," there had been a distinct impression of wax affixed to the paper as the seal of *Murphey*, and it had been agreed by him and the plaintiff, that the seal should be torn away, and the paper re-delivered as a promissory note, and in the act of destroying the seal a minute portion of the wax had still adhered to the paper, can it be doubted that these facts being ascertained, the instrument would be declared no longer a deed ? We think that the judge acted correctly in refusing to decide upon inspection, whether the instrument was a deed or not, and in leaving the evidence of the disputed facts connected with the alleged destruction of the seal to the jury, and in the instructions which he gave, respecting the operation of the law upon the facts, as the jury should find them to be. The jury found in favor of the plaintiff on both counts in the declaration.

The simple contract debt of a partnership is not merged by the several bond of a partner.

It has been contended here, though not with much earnestness, that the simple contract arising upon the sale of the goods, had been merged in the specialty which had been given by *Murphey*, and that the

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action of assumpsit could not now be maintained, and that the plaintiff should not have been permitted to recover on the second count. The principle is certainly correct, that when a person indebted by simple contract gives a bond for that debt, the simple contract is merged in the specialty, which is an instrument of higher dignity in the eye of the law. But it is perfectly settled that the giving of a bond by one copartner for a debt of the firm, does not extinguish the original debt as to any other copartner. The bond merges the simple contract only as to him whom it binds, and a partner cannot by deed bind others beside himself. (*Spear* v *Gillett*, 1 *Dev. Eq. cases*, 466, *Gow.* 76.) We therefore are of opinion that the judgment should be affirmed.

The case of *Spear* v. *Gillet*, (1 *Dev. Eq. cas.* 466,) approved.

Per Curiam.—Judgment affirmed.

The Buncombe Turnpike Company,

v.

Samuel Newland.

A carriage used for the transportation of the mail and of passengers, is a pleasure carriage within the act of 1824, (*Rev. ch.* 1258,) incorporating the Buncombe Turnpike Company, and subject to a toll of two dollars and fifty cents.

Assumpsit, "in which the plaintiffs declared against "the defendant as the contractor or owner of the mail "stage, for tolls alleged to be due for the passage of the "said stage along the Turnpike Road. But the court, "Strange, Judge, being of opinion that the plaintiffs "were not authorised by the terms of their charter to "charge any toll for mail stages, and there being no ev- "idence of any special agreement, nonsuited the plain- "tiffs, who appealed."

The following is a copy of that section of the act of incorporation which authorises the collection of tolls:

"And it shall and may be lawful for the President "and Directors, during the said term to demand and re- "ceive at some convenient toll gates, to be by them erec-

"ted, the following tolls, to wit :—On every four wheel "carriage two dollars and fifty cents, on every gig or "sulkey one dollar, on every six horse wagon two dollars "and fifty cents, on every four horse road wagon, two "dollars, on every three or two ditto one dollar and "fifty cents—on every pedlar's cart one dollar and fifty "cents; on every road cart fifty cents."

The *Attorney General* for the plaintiffs, cited *Moss* v *Moore*, (18 *John. Rep.* 128,) *Pardee* v *Blanchard*, (19 *Ib.* 442,) and a number of acts incorporating toll bridges, and turnpike roads, in all of which he insisted there were but two kinds of carriages described, viz : those for the transportation of persons, usually called pleasure carriages, and those for the transportation of produce or merchandise.

No Counsel appeared for the defendants.

RUFFIN, Chief-Justice.—This is a case so shortly and imperfectly stated, that we are not certain that the only point presented, is really the only one which it was intended to present. As the record speaks, the single question is, whether by the terms of the charter, the plaintiffs can recover in this action a toll on a carriage belonging to the defendant which is called a *mail stage*.

There might possibly be a question, whether a carriage engaged in the service of transporting the mail is not privileged. Although not made on the trial, if it were clear for the defendant, it would be useless to send the case back to a new trial, and the judgment might be affirmed as it ought to be on the whole record. Supposing however, that the United States can use any road established by Congress as a post road, yet the use by persons employed in a particular civil service, must be deemed to be intended to be on the terms prescribed to all persons, unless the law under which it is performed, declares the contrary. We have found no act of Congress exempting persons or carriages engaged in the business of the post office, from the payment of tolls for passing ferries, bridges or roads. As such tolls are granted as the price of constructing and repairing those

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public accommodations, and are necessary for those purposes, and to no establishment are such facilities more indispensable than to the post office itself, it is probable that no such act ever has been, or ever will be passed. Without a statute, no exemption can be inferred or allowed. It may be true that the progress of the mail cannot be arrested by distraining the carriage or horses for the tolls, although private property. That however only affects that particular remedy. The question recurs whether the owner being a private person, and transporting the mail under contract, be not liable for the tolls, to be recovered by action, like any other debt contracted by him. Upon that we see no reason to doubt until the contrary, if it can be, shall have been enacted. In truth however, the Court does not consider that question open upon the record. It does not appear even that the defendant was transporting the mail, or was otherwise actually engaged in the public service, at the times of passing the road; and the decision was confined to the other point, namely, the construction of the statute of this State. Upon that, this court does not concur with his Honor, and must therefore award a new trial.

The act of incorporation gives a toll on every four wheel carriage of pleasure, of $2 50; on every gig and sulkey, on every six horse wagon, four horse wagon, two horse wagon, pedlar's cart and road cart, the several sums mentioned in it. In the enumeration, "mail stages," or any other carriage transporting the mail, are not included by specific name and as a distinct class of vehicles. On this ground, the decision seems to have been founded.

The construction is very strict, and can only be sustained by regarding the road as primarily a public highway, and the grant of tolls as an invasion of the prior and common right of the citizen. This seems to us not to be the proper principle of construction. It is true the road is a highway, but not a common and free highway. It was constructed by the plaintiffs at their own expense, and is to be kept in repair by them for a long period un-

der heavy penalties. As a compensation for their services, and as a reimbursement of their expenditures, the tolls are granted. It is also true that only such tolls can be exacted as are granted. But in ascertaining the extent of the grant, the words are to receive a fair interpretation, according to the meaning of the Legislature, and the sense in which they are commonly understood. It is not to be presumed, that passage to any person or thing was intended to be toll free, unless either there be a special exception, or they cannot reasonably be brought within the meaning of general terms descriptive of the subjects made liable to tolls. The presumption, especially when only general terms are used, is the other way—That every thing which those terms will include, shall pay the toll. The owners of the road have a fair right to remuneration from all who derive a benefit from their labour. Besides, by another section of this act, the annual profit is limited, so that the exemption of particular persons may operate as a burden on the rest of the community, which is not to be favored or implied.

Here only a very general description is found; *carriages of pleasure* for instance, embrace a great variety of kinds, known by different names. If the vehicle in question be of the character of any of those mentioned in the act, as four wheeled carriages of pleasure, gigs, sulkies or any of the several sorts of wagons or carts, it is in our opinion within the act, although the Legislature did not descend so far into particulars as to call it a stage, or a mail stage.

The case does not set forth its construction as to the number of wheels, or as to its adaptation to such uses as contra-distinguish a carriage of pleasure from one of burthen, so as to enable us to determine the particular toll chargeable on it. Indeed it does not seem that the plaintiffs reached that part of their case, as the Court, as we understand, ruled that whatever might be the construction, the case was for the defendant, because the act did not expressly mention a mail stage. If it be included among, and under any of the terms used accord-

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ing to the true construction of the act, the judgment is erroneous. We think it certain that it must come within one or other of the descriptions, although for the reasons stated, we cannot tell which. If a "stage" or "mail stage" had been used, it would not have been a proper term, for it is not descriptive of any species of carriage, but of a particular use and mode of travelling of every species. A *stage coach*, or *stage wagon*, does not mean a particular kind of coach or wagon, but that the coach or wagon of any kind, journies at regular periods from one point, post or *stage* to another. We cannot give our opinion conclusively as to the character of the vehicle in question, but as it may enable the parties to conclude their controversy by another trial below, without again bringing the case here, we consider it our duty to express, what we clearly think is the construction of the charter. Under the terms of the statute the vehicles are to be understood, as those on the one hand, which are of the construction ordinary and proper, and which are commonly used, for the transportation of produce, merchandize, and other heavy burthens on roads, and farms; and on the other, those used for the transportation of persons and their travelling baggage, and constructed with a view to such transportation in a speedy and comfortable manner, after the general form and workmanship, bestowed on carriages in which persons are usually transported. From our knowledge of the carriages commonly employed as mail coaches, under contracts, including the transportation both of the mail and passengers, we should not doubt that this vehicle is subject to the toll as a carriage of pleasure.

Per Curiam.—Judgment reversed.

THOMAS J. HAMPTON, *et ux.* v. JOSHUA WILSON.

The repetition of a slanderous report is actionable, and the defendant cannot justify by proving the existence of the report, without also proving it to be true.

Per RUFFIN, C. J. *arguendo.* The rule that one who repeats a slanderous report, and gives the name of his author, may justify by pleading that fact, has been doubted, and must depend upon the intent with which the report and the name of the author are mentioned. It *seems* that it does not obtain in actions for libels.

CASE for slanderous words spoken of the *feme* plaintiff, before her marriage.

PLEAS, *not guilty, and a justification.*

On the trial before STRANGE, Judge, at Lincoln, on the last circuit, the evidence was, that the defendant had said that it was reported the *feme* plaintiff was incontinent. The defendant offered proof of the existence of such a report, but of no fact or circumstance in any way impeaching her character.

His Honor charged the jury that if there was such a report in circulation it could not avail the defendant upon his special plea, justifying the words. A verdict was returned for the plaintiff, and the defendant appealed.

The case was submitted without argument, by *Badger* for the defendant, and *Devereux & Pearson* for the plaintiffs.

RUFFIN, Chief-Justice.—The only question in this case is, whether the defendant's plea of justification is a bar, without an averment in it, and proof that the report propagated by the defendant, was true in fact. The learned Judge held that it was not, unless the matter was true as reported, and the defendant excepted to his opinion.

The case of the *Earl of Northampton,* (12 *Rep.* 132,) is the leading authority upon this subject. It is there laid down, that in slander of a private person, if J. S. publish that he hath heard J. W. say that J. S. was a thief, if the truth be such, he may justify. But if

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J. S. publish that he hath heard generally, without a certain author, that J. S. was a thief, then an action lies against J. S. although in truth he might have heard those words, for this, that he hath not given to the party grieved any cause of action against any but himself. It is believed that the position of *Lord Coke*, which bears upon the present question, has never been doubted, but has been deemed settled law ever since. The first of those rules has indeed been several times questioned and with apparent reason, but the grounds on which the correctness of that has been scrupled, serve but to confirm the latter, and evince entire satisfaction with it. Indeed it would seem impossible to assent to the first proposition, to the extent of its terms, without some qualification. For it cannot be denied, that the repetition of a slander may in fact be highly detrimental, and it is easy to imagine, nay it is the natural inference from the act, that the repetition of slanderous words, even as those of another, vouched at the time, may be upon the intent to circulate the scandal and cause it to be believed; and such intent and effect are apparently injurious. Yet the rule taken literally, denies redress by allowing the repeaters to justify by a plea which avers only the truth of *his* words, without also averring the truth of those of his informer, thereby putting in issue the imputed guilt of the plaintiff, or that the repetition was upon an occasion shown in the plea to be necessary and innocent, thereby rebutting the bad motive implied. This would be to establish the privilege of circulating, under the name of another, a false charge, although the party knew it to be false, and withheld that circumstance. Again: suppose one to say, A told me that B was a thief, and desired me to tell all I should see that he said so, and he accordingly makes it his business to publish it in the words and upon the authority of A. It is obvious, that in intention and by his actions, he gives the accusation his own sanction; and in point of fact, may injure the accused as much as if he professed to affirm what he merely declares another to have affirmed, and perhaps more, as in effect, there are two accusers instead of one—since

all will ask, why so anxiously publish the words, if he does not believe them. Yet, in words, the propagator expresses no opinion, belief or accusation of his own, so as to render him liable to an action, if the truth of his words merely will justify them. Such a doctrine is against good morals, and would destroy the peace of society. He who publishes slanderous words even as those of a third person with the intent, (to be collected from the mode, extent, and circumstances of the publication,) that the charges should be believed, does an injury in fact to the person slandered, and ought to answer for it. Without undertaking to settle the mode of pleading, we consider it safe to say, that as a plea in bar by itself, the justification is not in all cases complete, merely upon the allegation that he did hear from A, the words which he repeated as those of A; but that the truth of the charge, the circumstances of the publication, the motives of the propagator do enter materially into the questions of injury to the plaintiff, and of the defendant's responsibility therefor. To that extent it must be understood, that Lord *Coke* meant his words to be modified. The justification does not consist merely in the facts, that the defendant heard the words, and gave up his author; for that gives him no right to repeat them, if false, especially if he knew them to be false, and with intent to cause the guilt of the plaintiff to be believed. Such conduct makes him the endorser of the slander, and gives the party grieved a recourse against him, or the author, or both. It has been strongly intimated that the broad doctrine of Lord *Coke* as applicable to libels, is altogether inadmissible. *Lewis* v *Walter*, (6 *Eng. C. L. R.* 535, and *Dole* v *Lyon*, (16 *John.* 447) were cases, where the defendants, the editors of newspapers, sought to justify by the allegation that they copied the publication from another newspaper, which they named as the authority. But the court thought that if the original publisher had been designated instead of his journal, it did not form a bar, by reason of the motive which ought to be the subject of inquiry by the jury, and the mischievous consequences of an enlarged publication.—

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Indeed there is a familiar case from which it is apparent that the printer is neither justified or excused by rendering the author. I mean an original libellous publication made as a communication with the author's name to it—certainly both the writer, and the printer are liable, for the latter aids in scattering the firebrands, and every printing of the scandal is a new publication.

In principle, I do not perceive a difference between oral and written slander in this respect. The injury is the same in its nature, though it may not be in degree. It is remarkable too, that, although the first part of the rule found in the *Earl of Northampton's case*, is often mentioned in reports and treatises, yet no adjudication is found, which directly affirms it, but in each instance, where it came under discussion, it is denied to be true in its utmost latitude or doubted, and the case then under consideration distinguished out of it.

Certainly then we are not at liberty to adopt that as a substitute for the latter part of the proposition, but are bound to receive and sustain in its integrity the later rule itself, in all cases which fall within it. If we did not, a person slandered might lose the whole benefit of this action. He could neither recover past damages, nor re-instate his character. Every one might alike justify upon common report, and the plaintiff could not put the fact, constituting his imputed guilt, in issue in any suit, which he could possibly bring.

Upon the matter of the exception therefore, this court concurs in the opinion of his Honor, and no other error is perceived in the record, of which the defendant can complain.

PER CURIAM.—JUDGMENT AFFIRMED.

GOVERNOR *upon the relation of* AQUILLA OXLEY, *et. al.*

v.

ISAAC C. FREEMAN.

Where one residuary legatee, who had hired a slave, part of the residue, from the executor for a year, sold him tortiously, in the presence of a joint legatee, who did not disclose his title, the executor cannot maintain trover against the latter.

This was an action of DEBT upon the bond given by the defendant, to secure the discharge of his duty as administrator with the will annexed of *William Rayner*. The breach assigned was, that the defendant had not accounted to the relators, who were some of the residuary legatees of *Rayner*, for a negro slave named *General*, who was of the assets of his testator, and who had come to his possession.

The defendant pleaded *performance*, and upon the issue presented by that plea, the cause was tried before MARTIN Judge, at Bertie, on the last circuit, when the following facts appeared in evidence.

The defendant had hired the slave to *Amos Doughtry*, one of the residuary legatees of his testator, for a year; that during that year *Doughtry* had sold the slave to one *Reddick*, who had removed him out of the State.— That the defendant had immediately commenced actions against *Doughtry* and *Reddick*, and had recovered judgments for the full value of the slave, but had not been able to procure satisfaction, because of their insolvency. That when the sale to *Reddick* was made, *John* and *Daniel Doughtry*, brothers of *Amos*, and also residuary legatees of *Rayner* were present, and did not object to it.— That *William Doughtry*, another brother, and also a residuary legatee, having heard of the intended sale the day before it was made, had advised *Reddick* against it, but after it had taken place had seen *Reddick* in the possession of the slave, and was present when the latter had carried him out of the county; and had taken no steps to prevent it, neither did he then object to the sale made by his brother. It was in proof that *William* and *Daniel Doughtry* were solvent, and for the re-

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lators it was contended, that *John*, *Daniel*, and *William* by being present at the sale to *Reddick*, and not objecting to it, or by permitting the slave to be removed, had made themselves equally liable with *Amos* to the plaintiff for the conversion, and that as he had not brought actions against them, he was liable to the relators for the value of the slave.

His Honor instructed the jury that when persons having a title to property were present at the sale thereof, either by a joint owner or by a person who had no title, it was presumptive evidence of an assent to the sale.—That if a person after objecting to a sale of property to which he had title, was shortly thereafter to see the property in the act of being removed by the purchasers, under circumstances which enabled him to make known his dissent to the sale, and he neglected to do so, that his assent to it might be inferred from these facts, and that if an assent by *John*, *Daniel* or *Wm. Doughtry* to the sale made by *Amos* was inferred by the jury, then they were liable for the conversion, and the defendant should have taken steps to subject them.

A verdict was returned for the plaintiff, and the defendant appealed.

No Counsel appeared for either party.

DANIEL, Judge.—The plaintiff was permitted to recover in this case on the ground that the defendant might, by an action of trover against *John*, *William*, and *Daniel Doughtry*, have recovered the value of the slave *General* from all or some one of them, and that he negligently omitted to bring such action, whereby the price of the said slave has been lost to the relators. The question presented is, could he have recovered if he had brought such an action? In trover the conversion of the property is the *gist* of the action, and in general, evidence of some tortious act is essential to a conversion. What will amount to a conversion when proved, is a question of law. In this case it was in evidence that *Amos Doughtry*, who had hired the slave of the defendant for the term of one year, sold the said slave out and out to *Reddick*, and that *John* and *Daniel Doughtry*,

his brothers, who had some equitable interest in the slave, were present at the time and place of sale, but they neither said nor did any thing relative to the transaction. *William* was not present at the sale, but had knowledge that *Reddick* was about to carry the slave away, and did not forbid, nor prevent his doing it.—*Amos* having the legal estate in the slave for the year, had of course the whole control and management of him for that space of time, *John* and *Daniel* being present at the absolute sale of the slave, and neither saying nor doing any thing, was evidence either of an admission, that they had no title to the slave, or a relinquishment of such title as they might have. An acquiescence and endurance, when acts are done by another, which if wrongfully done are encroachments, and call for resistance and opposition, are evidence as a tacit admission that such acts could not legally be resisted, (2 *Starkie*, 37. 38.) A sale of property by one who has no title, in the presence of the owner, without objection on his part has been said to estop the latter from impeaching the transaction on the ground of his better title, (*Bird* v *Benton*, *ante* 2 *vol.* 179.) Perhaps the more accurate phrase would be, that this conduct is strong evidence of a waiver of such title. But whether it amounts to a technical estoppel, or to a virtual relinquishment, we know of no rule of law which declares that the bare presence of a person, neither doing nor saying any thing when another person does an illegal act, makes of itself, the former a confederate in the illegal act so done by the latter. The owner being present, when a sale of his property is made by another, if he makes no objection, and fails to disclose his title, may rightfully be precluded from setting it up afterwards. But the law does not go farther, and from that circumstance declare that he makes the sale, particularly if that sale is to be held a tortious and illegal act, as relating to the rights of third and absent persons. We think from the case stated, that the defendant could not have recovered the value of the slave from either of the three brothers of *Amos Doughtry*, and that a new trial must be granted.

The case of *Benton* v. *Bird*, (*ante* 2*d vol. p.* 179) approved.

One who stands by, while property in which he has an interest, is sold, waives his title in favor of the vendee.

But he does not thereby, become guilty of a conversion as to a third person.

PER CURIAM.—JUDGMENT REVERSED.

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ALEXANDER GRAY, *et. al.* v. GEORGE HOOVER.

The act of 1777, *(Rev. ch.* 115 § 69,*)* makes the Sheriff special bail, when he neglects to return a bail bond, and to charge him as such, no notice to him of his liability is necessary.

SCIRE FACIAS against the defendant, the Sheriff of Randolph, seeking to charge him as special bail of one *Joshua Cox*, who he had arrested, and discharged without taking bail. The *sci. fa.* set forth the judgment in favor of the plaintiffs against *Cox*, the fact that it remained unsatisfied, and that the Sheriff had not returned a bail bond with the writ, but it did not set forth the issuing of a *ca. sa.* against *Cox*, and a return of *non est inventus.*

PLEA, 1st. *Nul tiel record.* 2d, That at the return term of the writ against *Cox*, no exception for want of bail was taken by the plaintiffs, and no notice given to the defendant to justify, or that he was held to be responsible as bail.

The plaintiffs took issue on the first plea, and demurred generally to the second. NORWOOD Judge, at Randolph, on the last circuit sustained the demurrer, and the issue in fact being found for the plaintiffs, judgment was entered according to the *sci. fa.* and the defendant appealed.

Winston and Mendenhall for the defendant, in this court moved in arrest of judgment, because the *sci. fa.* did not aver the issuing of a *ca. sa.* and a return of *non est inventus.*

Nash for the plaintiffs.

DANIEL, Judge.—After stating the case as above proceeded :—The defendant contends that the plaintiffs demurrer to his special plea should have been overruled ; because, he says, the sixty ninth section of the act of 1777, (*Rev. ch.* 115,) subjects the Sheriff as special bail only on certain conditions, one of which is that whenhe shall arrest any person on a bailable writ, and shall fail to take a bail bond, and return the same with the writ, then he

shall be held, and deemed special bail on the plaintiffs giving him notice that he looked to him, and considered him special bail, otherwise he is not special bail.

We cannot give such a construction to that section as the defendant contends for. The section contemplates making the Sheriff special bail in two cases: first when he has not taken any bail bond: secondly, when he has taken insufficient bail, and exception shall be taken thereto the same term the writ is returnable, and notice given that term to the Sheriff to justify, and he does not justify, then he becomes special bail. When the Sheriff fails to take any bail bond, he is special bail himself, without any other notice than that which he receives from the law. There is a *proviso* which enables the defendant to put in new bail, before the time given him to plead has expired, and then the Sheriff is discharged, and also authorising the Sheriff to surrender in discharge of himself.—When the Sheriff has not taken any bail bond, he is not entitled to any notice from the plaintiff in order to subject him as bail; this point has been decided by this court after an objection similar to the one now made, (*Governor* v *Jones*, 2 *Hawks*, 363.) We think the demurrer was properly sustained by the court.

Secondly: the defendant in this court, moves in arrest of judgment, because the *Scire Facias* does not recite that a *ca. sa.* had issued on the judgment, and had been returned *non est inventus*. He contends that as the act of Assembly expressly requires that a *ca. sa.* shall issue, and be returned before a *scire facias* shall go against the bail, it is necessary that it should be recited in the *scire facias*.

Bail can take advantage of an omission to issue a *ca sa.* only by a special plea.

In England the *scire facias* only recites the recognizance of bail, and the judgment against the principal, and that he has not paid, it or rendered himself—it does not recite the *ca. sa.* or the return of *non est inventus*, (*Archb. Appdx.* 253, 254.) If the *ca. sa.* has not issued, or has not been returned *non est inventus*, the defendant must take advantage of the omission by a special plea, (*Lutw.* 1825, 1 *Archb. Prac. B. K.* 319, *Philpot* v *Manuel*, 16 *Eng. C L R* 244,) he cannot take the objection on the plea of *nul tiel record* for that refers only to

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the record of the judgment, (*Handy* v *Richardson*, 2 *Hay.* 136.) In England the practice is to issue the *ca. sa.* and lodge it in the Sheriffs office, where it must be the four last days exclusively before the return. The Sheriff then returns *non est inventus* as a matter of course, without making any attempt to arrest the defendant, the *ca. sa.* being intended merely as a notice to the bail of the plaintiffs intentions to proceed against them, (*Hunt* v *Cox*, 3 *Bur.* 1360. 1 *Archb. P.* 320.) The act of 1777, which requires that a *ca. sa.* shall issue against the principal, and be returned *non est inventus* before a *scire facias* shall issue against the bail, is to be considered only as re-enacting the rule and practice in the English courts, with this exception, that the Sheriff must make a diligent effort to execute the *ca. sa.* It has been determined in this State, that it is not necessary to recite the *ca. sa.* against the principal in a *scire facias* against the bail, (*Langdon* v *Troy*, 2 *Hay.* 15. *Arrenton* v *Jordan*, 4 *Hawks* 98.) We are of the opinion that the motion in arrest of judgment should be overruled, and that the judgment of the Superior Court should be affirmed.

The cases of *Langdon* v. *Troy* (1 *Hay.* 15) and *Arrenton* v *Jourdan*, (4 *Hawks* 98,) approved.

PER CURIAM.—JUDGMENT AFFIRMED.

JANE M. OTT v JAMES M. GRICE, *et. al.*

When a house under lease is pulled down by a trespasser, the owner can maintain case for the injury done to the freehold, and is in law entitled to recover damages, the amount of which depends upon the circumstances of the case.

CASE—for an injury done to the plaintiffs reversionary estate in a house and lot in Elizabeth City.

PLEA—*not guilty*,

On the trial before MARTIN Judge, at Pasquotank, on the last circuit, the case, was that the plaintiff had title to the premises, which were leased out by the month—that the house was old, but not dangerous to persons passing by it, and that the defendants had in

the night pulled down a shed attached to it, injured the chimney, and torn off some of the weather-boards. The defendants attempted to show that the house was worthless, and succeeded in proving that the rent for the ground alone, would be worth more than that which the plaintiff obtained for both the house and ground. But it appeared very clearly that the house would have stood for two years without repair, and that during that time the plaintiff might have leased it for two dollars a month.

His Honor informed the jury that if the defendants had done a permanent injury to the freehold, which rendered it less valuable to the plaintiff they ought to find for her—but if no such injury had been done, they ought to find for the defendants.

The jury returned a verdict for the defendants, and the plaintiff appealed.

Iredell for the plaintiff.

Kinney for the defendants.

DANIEL, Judge.—After stating the evidence and charge as above, proceeded:—The law authorises the reversioner to maintain an action on the case, and to recover damages for an injury done, if the injury was sufficient to prejudice his interest in the reversionary estate, or for any act injurious to the reversion. (1 *Chit. Plead.* 51 142.) The charge "that if there had been a *permanent injury* to the freehold," explained by saying "an injury which rendered it less valuable to the owner of the freehold, the plaintiff might recover," was a charge not in the main erroneous. But when considered in reference to the testimony before the jury, and the points contested by the parties, we think it erroneous as tending to mislead the jury. The plaintiff was entitled to recover if her reversionary interest had sustained any injury. If the evidence given on the trial was true, even that evidence only which the witness for the defendants gave, still the plaintiff was in law entitled to recover. We think that the plaintiff, (the reversioner,) had a right to have the house and lot of land, in such a plight and condition as she thought

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proper or fit to put them in herself, or caused to be put or placed in by others, provided that neither the public nor other persons were injured thereby. And we think that it is no answer to an action, brought by a reversioner for an injury to the inheritance, for the defendant to say, "to be sure I pulled down your house, I cut down your grove, or I destroyed your forest of timber, but your lands will rent for as much or more now, than they did before the act was done." If a tenantable house containing a tenant rendering rent, is torn down or dilapidated, so as to render it untenantable, this act, in law, is such an injury to the reversionary estate, as to enable the owner thereof to maintain an action on the case, to recover damages. We think the Judge should have told the jury, that if they believed the evidence, then the plaintiff was, in law, entitled to recover some damages, and that the only thing for them thereafter to do, would be to assess the amount. Upon the whole case, we think the judgment must be reversed, and a new trial granted.

Per Curiam.—Judgment reversed.

Hardy Bryan v. John Washington, *et. al.*

The act of 1830, *(Rev. ch.* 1045,) and of 1829, *ch.* 32 do not give Justices of the peace jurisdiction beyond sixty dollars, except when the debt is secured by a bond or note, or a liquidated account, and an attachment founded upon two former judgments for a sum exceeding that amount is void, and is not a justification to an officer acting under it.

Trespass, for seizing and taking out of the possession of the plaintiff three slaves.

The defendants justified under process against one *Sears Bryan*, whose property they contended the slaves were—upon this plea the following facts were in evidence. The process was an attachment, dated April 13th, 1833, upon two judgments in favor of the defendant *Washington*, each for $46 50, which were dated

June 9th, 1813, and returnable before a Justice of the peace. The plaintiff contended that a Justice had no jurisdiction of a debt, for a sum exceeding sixty-dollars, unless secured by bond, note or liquidated account, and as both the judgments were included in the attachment it was void, and did not justify either of the defendants. The presiding Judge, being of that opinion, a verdict was returned for the plaintiff, and the defendant appealed.

Mordecai for the plaintiff.

J. H. Bryan contra.

DANIEL, Judge.—After stating the case as above, proceeded :—By the act of 1803, (*Rev. ch.* 627,) a single Justice of the peace has jurisdiction of all debts and demands of £30 and under, of such things as are specified in the act, and among the demands specified is that of a judgment which may have been granted by single Justice, and no execution issued on the same for twelve months. In the case before the court, the Justice has taken jurisdiction of a demand of $93, made up by joining two justices, judgments, (each of which singly was within the jurisdiction of the magistrate,) in the same attachment. The Justice had no jurisdiction, in our opinion, to issue an attachment returnable before himself, and to render a judgment for the sum of $93, unless the same had been due by bond, note, or signed account as mentioned in the acts of 1820, (*Rev. ch.* 1045,) and 1829, *ch.* 32. Only in these three cases, has the law given a Justice of the peace jurisdiction of debts or demands beyond the sum of thirty pounds. And as the Legislature has been so particular, as to make an express enumeration of the description of cases where the jurisdiction of a Justice should be raised above thirty pounds, we think that all non-enumerated cases were intended to be excluded.—We do not feel ourselves authorised to add another case to the list, although it is one strongly within the reason of the Legislature for making out the three enumerated cases. The magistrate therefore having no jurisdiction in

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this, the attachment and proceedings under it were void, and could be no justification to the defendants in taking the slaves from the possession of the plaintiff.

We do not mean to be understood as declaring that a judgment, rendered in a case clearly within the jurisdiction of a justice when signed, will be out of his jurisdiction, if the growing interest shall make the demand above £30 after twelve months shall have elapsed from the date of the judgment. We think a warrant may be brought before the Justice of the peace, and the plaintiff may declare on his old judgment, although the principal and interest may amount to more than £30. It is a jurisdiction incidental to, and necessarily growing out of that, which authorised him to give the first judgment, and enforce its payment—it permits him to complete that which he had a right to begin. The second warrant on the old judgment is in the nature of a *scire facias* to revive it, and is cognizable before the magistrate. But the plaintiff has no right to join several old judgments, although each singly is within the jurisdiction of a justice so as to warrant for, and recover a sum exceeding £30, by means of such consolidation. We are of opinion that the judgment rendered in the Superior Court should be affirmed.

Per Curiam.—Judgment affirmed.

Sarah Brooks v. Sparkman Britt.

A swamp is a natural boundary, and if a deed calls for one, the course and distance must be disregarded. But in such a call, whether the margin of the swamp, or the run of it is intended, is a matter of fact which is, upon the evidence offered, to be found by the jury.

Trespass quare clausum fregit, tried before his Honor Judge Settle, at Pitt on the last circuit.

Plea—*not guilty*.

There were several points made in the case which it is not necessary to state—the only one discussed in this

Court being the following: The defendant claimed under a patent which described the land thereby granted, as "lying on the north-east side of Swift creek swamp, "on the east prong of said creek, beginning in the said "swamp on Earl Granville's line, running with said line "east, ninety six poles to a pine, thence south forty de- "grees, east four hundred poles, then west to the said "swamp, then up the said Swift creek swamp with the "windings thereof to the first station." His Honor informed the jury that where a natural boundary was called for in a grant, the course and distance were disregarded and the line was extended to the natural boundary—that a swamp was a natural boundary, and that if there was a certain and known channel for the water of the swamp to run in, the call in the defendants deed went to the said swamp, and should be extended to that channel without regard to course or distance. A verdict was returned for the defendant and the plaintiff appealed.

Mordecai for the plaintiff.

The *Attorney General* for the defendant.

GASTON, Judge.—We have not the right to examine, nor the disposition to enquire, whether the verdict of the jury be correct or incorrect. Our duty confines us to the propriety of the instructions which were given by the judge, and which have been excepted to by the appellant. Although in the main we approve of these instructions, we think there is one error in them which may have had a material influence upon the jury, and which requires that the judgment be reversed, and a new trial awarded.

The matter in controversy, depended upon the ascertainment of the boundary of the defendant's grant.—This was described, as "lying on the north east side of "Swift creek swamp, or the east prong of said creek, "beginning *in* the said swamp, on Earl *Granville's* line, "running with said line, east ninety-six poles to a pine, "thence south, 40° east four-hundred poles, then west, "*to* the said swamp, then up the said Swift creek swamp,

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"with the windings thereof to the first station." His Honor was unquestionably correct in laying it down as a principle in law, that the swamp was a natural object more certain, and therefore more worthy of reliance than the distances called for in the grant; that this swamp was in law, a boundary of the patent, and that the defendants grant must be extended to it, if the distances would not reach, and restrained by it, if these distances over-reached it. But we are of opinion, that he erred in pronouncing that if there was a certain and known channel for the water to run in said swamp, the call of the grant was for that run. Whether the run in the boggy and sunken land, or the margin of such boggy and sunken land, was the call of the grant, depended upon facts fit to be proved, and proper to be passed upon by the jury. If when the grant issued, the low grounds were known as the Swift Creek swamp, and the run or channel was not termed the swamp, but had another appellation, such as Swift Creek, or east prong, or any other distinctive name, then the call of the grant was for those low grounds, and not for the run. If on the contrary, the run was then known as Swift Creek swamp, and the bottom lands were distinguished from it as the low grounds of that swamp, then indeed, the call was for the run, and not for the low grounds. If each were known by the same appellation, and indiscriminately called Swift Creek swamp, then there were two natural objects, either of which correspond with this call of the grant, and *which* of these was intended, might and ought to be determined by reference to other matters of description in the grant, or to extrinsic facts, rendering the one or the other more probable.

PER CURIAM.—JUDGMENT REVERSED.

DANIEL SHIPMAN *v.* JONATHAN MEARS.

A Justice of the Peace may, under the act of 1803, (*Rev. ch.* 627, § 3,) postpone a cause pending before him, for thirty days, excluding Sundays.

This was an action commenced by a warrant in the common form, in which the plaintiff sought to recover the amount of a former judgment; the warrant was dated the 8th of May, 1832. On the second of June following, an endorsement on the warrant was made of the following purport: "Postponed until the "4th day of July next, then to be tried in Elizabethtown." On that day, the Justice nonsuited the plaintiff, reversed the former judgment, and issued a *supersedeas* to the constable, and process to the parties to appear and litigate the matter anew; and within thirty days thereafter, the first judgment was affirmed, and the defendant appealed to the County Court; where the judgment of the justice was affirmed, and the defendant appealed to the Superior Court.

On the last circuit at Bladen, before His Honor Judge SEAWELL, the cause was tried on *nil debet*, and the plaintiff had a verdict. The counsel for the defendant then insisted that the plaintiff was not entitled to recover, because the justice having continued the cause for more than thirty days, by the postponement from the 2d of June to the 4th of July, the warrant became thereby inoperative, and all subsequent proceedings thereon were void. But his Honor held that the third section of the act of 1803, (*Rev. ch.* 627) restricting continuances of causes before single magistrates to thirty days, was to be construed in connexion with the sixth section of the act of 1794, (*Rev. ch.* 414,) whereby warrants were to be returned within thirty days "Sundays excepted," and that as there were not thirty judicial days between the 2d of June and the 4th of July following, the warrant was properly constituted at the time the judgment was rendered. His Honor was further of opinion that the jurisdiction of the magistrate did not

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depend upon the continuance being for a period not exceeding thirty days, that the act was directory to prevent a surprise upon either party, and if after a postponement of more than thirty days a judgment should be confessed, or if the postponement should be by consent, that the justice would have jurisdiction to act, and the parties would be bound, and therefore, it was incumbent upon the defendant to plead such matter in abatement, in order that the plaintiff might by his replication show how the postponement had taken place.—Judgment was rendered upon the verdict and the defendant appealed.

No Counsel appeared for either party.

Daniel, Judge.—The Judge below was of opinion that the continuance of the trial of the warrant from the 2d day of June 1832, to the 4th day of July following, was what the justice had a right to do, by virtue of the act of 1803, (*Rev. ch.* 627, *sec.* 3.)

We agree with the judge in the above opinion—although the words "*Sundays excepted,*" are not incorporated in the third section of the act of 1803, yet from what is in the preamble to that section, we must understand the enacting part to mean, that a Justice of the peace shall have power to enter a continuance or postponement of trial, of any civil matter before him, to any period of time within thirty judicial days from the date of the entry, that is, "*Sundays excepted,*" for *dies dominius non est juridicus.* The preamble to the aforesaid section informs us that "doubt had arisen whether any investigation or decision can be legally had on a warrant in any case *after thirty days from the date thereof,* although the same may have been executed and returned in due time, and for sufficient cause shown, postponed by the justice for remedy whereof, "*Be it enacted, &c.* that on oath being made by either of the parties, the justice may continue or postpone the trial of the cause, provided such postponement shall not exceed *thirty days.* The Legislature must have meant, as it seems to us, that the continuance of the cause should be confined within the same

time that the act of 1794 authorised and directed the justice to cause his warrant to be returned in the first instance, viz: thirty days, "*Sundays excepted.*" If the Sundays are taken out in computing the days between the two periods of time, then the trial day would be within the time limited by the act.

A miscontinuance before a justice of the peace, cannot be taken advantage of by the defendant, after he has appealed and pleaded to the cause in the court above.

Secondly:—If there had been a miscontinuance the defendants instead of bringing a writ of false judgment, appeared at the trial and appealed from the judgment to the county court, and even then no motion was made to quash the proceedings, for irregularity, nor was any plea entered. The plaintiff again obtained a judgment in the county court, and the defendant appealed to the Superior court, where they entered the plea of *nil debet* in bar of the plaintiffs demand. The Judge was of the opinion that if the magistrate had acted illegally in the continuance over that the defendants had waived the objection by pleading in bar of the demand. This court is by no means prepared to decide that after an *appeal* the defendant could, by any plea, be admitted to deny that there was a judgment from which he did appeal, but if he could, then the court concurs also with the opinion of the Judge on this point, for it is a rule in pleading that good matter must be pleaded in right form, apt time and in due order. If the defendant pleads in bar to the action he admits the form of the writ and count—he answers to the right in demand, and puts that right in issue, and thereby admits that there is a sufficient *forum* to put it in issue. (5 *Bac. Ab*, 327, 328). If there was any error in the proceedings before the Justice, the subsequent consent of the defendants to go on with the case, took away the error.

PER CURIAM.—JUDGMENT AFFIRMED.

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DEN *ex dem* EDMUND S. GODFREY, *el. al.*
v.
GIDEON CARTWRIGHT.

On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessors of the plaintiff must at their peril, take out a writ of possession only for land to which they have title.

EJECTMENT, tried at Camden on the Spring circuit of 1832, before SWAIN Judge.

The declaration set forth a demise by the lessors of the plaintiff of the several estate of the wife, and upon the trial it appeared that *Isaac Guilford* the father of the *feme* lessor, had died seized of the land in dispute, leaving three children to whom it, together with several other tracts of land, descended. The plaintiff produced copies of two proceedings in partition, by which the land described in the declaration had been assigned in severalty to his lessors. Both of them were made upon the *ex parte* petition of *William Guilford*, a co-tenant, and one of them was incomplete, there being no final judgment. All the co-tenants were present when the *division* was made under an order in the other, and assented thereto. The defendant showed no title, and contended that the proceedings in partition were inoperative, and that the lessors of the plaintiff could claim no benefit under them.

The jury under the directions of His Honor returned a general verdict for the plaintiff and the defendant appealed.

Kinney for the defendant.

Iredell contra.

DANIEL, Judge.—The Counsel for the plaintiff admits that he is not entitled to lands described in the declaration, by virtue of either or both of the attempted partitions of the lands mentioned in the case; they are irregular and illegal. But as *Isaac Guilford* was entitled to the land in fee simple at the time of his death the same descended to his three children as heirs at law. That

Lydia one of the lessors of the plaintiff is one of the heirs of *Guilford*, and in that character had a right to demise the lands described in the declaration, so as to enable the nominal plaintiff to recover his term in an undivided third of all the lands therein described. On a several demise of the whole tract of land, by one tenant in common, the plaintiff in ejectment may recover his term of such an undivided portion of it, as the lessor can prove title to on the trial. The more correct way of proceeding is for the jury to find the defendant guilty of the trespass and ejectment in the undivided portion of the lands described in the declaration, which the lessor of the plaintiff proves title to on the trial, and then the judgment shall be rendered accordingly. (*Archb. Forms*, 380, 381.) In the present case the jury have found a general verdict, and the nominal plaintiff must have judgment that he recover his term. The lessors of the plaintiff, when possession shall be delivered to them under the execution, must at their peril take possession only of such lands as they are entitled to. We think the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

DEM *ex dem* CATHARINE DODSON, *et. al.*

v.

SIMON W. GREEN.

Where a devisor gave a tract of land to A, excepting two acres which he devised to B, and before a severance of the latter, A purchased them from B, and held the whole together during his life as one estate, and by his will devised it as "the land whereon I now live," the whole passes thereby, although further described as of the quantity it would have contained, had there been an actual severance.

This was an action of EJECTMENT in which on the last circuit at Warren, before SETTLE Judge, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case:

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Simon Williams the elder devised the land in dispute to his wife for life, describing it "as the land and plantation whereon I now live, containing six hundred and forty acres." By the two succeeding clauses of his will he devised as follows: "I give and devise unto my son "*William Williams* the tract of land whereon I now live, "containing 640 acres, (except the mill and two acres "adjoining thereto, the two acres to be laid off in the "most suitable manner,) to him, his heirs &c. I give and "devise unto my son *Simon Williams* one half the mill, "and half the two acres of land, after the death of his "mother, to him, his heirs, &c." I give and devise to "my son *Alison Williams*, one half of the mill, and half "of the two acres adjoining thereto after the death of "his mother, to him, his heirs &c." After the death of the testator, *Simon*, the younger, purchased of *William*, the land devised to him, and also of *Alison* his undivided moiety of the mill, and the two acres of land directed to be laid off adjoining thereto; and he becoming thus entitled to all the land mentioned in the will, the two acres adjoining the mill never were laid off. *Simon* the younger lived upon the land devised by his father to his brother *William*, bought a tract of land adjoining it, repaired the mill, and during his life cultivated land on the mill creek, both above and below the mill—that, and the two acres adjoining it being situated within the body of his cleared land. By his will he devised as follows: "I give "my nephew *Simon W. Green*, (the defendant,) negroes "*Davy* &c. (mentioning a number,) and also the land "whereon I now live, and my Hargrove tract, all con- "taining seven hundred and eighty seven and one half "acres, also my household and kitchen furniture, also "my wagon, &c. belonging to the plantation whereon I "live, (one acre of land I except, to be laid off around "my fathers and mothers graves and others,) to him, and "his heirs forever."

The will contained two other clauses giving specific legacies to two other nephews—and no residuary clause was added.

The land on which the last mentioned testator lived,

and which is described in his will, deducting from it the mill and two acres, contained exactly seven hundred and eighty-seven acres and a half.

The lessors of the plaintiff were the heirs at law of *Simon* the younger, and contended that the two acres of land adjoining the mill had been severed from the tract of six hundred and forty acres, and did not pass to the defendant, but descended to them.

The defendant insisted that the mill being situated on the tract of six hundred and forty acres, and the two acres never having been actually severed from it, in law passed under the devise to him, and His Honor being of this opinion, judgment of non-suit was entered, and the plaintiff appealed.

Devereux for the plaintiff.

Badger & W. H. Haywood for the defendant.

RUFFIN, Chief-Justice.—Upon hearing this case, it seems impossible to doubt either upon the words of the will, or the circumstances stated, that it was the intention of the testator to dispose of the mill, and the two acres of land, with the residue of the tract of which it originally formed a part, to the defendant. It is not like the cases cited, where the devise of land by a particular name, which was known by that name, was confined to the distinct parcel, notwithstanding other more general words. Nor is it like *Helme* v *Guy*, (2 *Murph.* 341,) where the words are "*the* tract of land whereon I now live," and the testator owned many tracts adjoining, which were known by different names, that on which he lived being called the "Radcliffe tract." The several tracts were distinct parcels originally; derived by the testator at different times, and by different titles, were never known by one and the same name, nor, as far as appeared, occupied together. They remained several and the devise could therefore only pass the particular one designated, although thus designated by the terms "the tract of land whereon I live" instead of "the Radcliffe tract."

But here the two acres formed a part of testators pa-

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ternal estate, and were never actually severed from it, by allotment under the devises in his fathers will. The whole, including the mill, was given in one devise to the mother for life, and was occupied by her as one estate. Before severance, the testator, *Simon* the younger, extinguished all other titles to the mill, and the other parts of the tract of land, and also occupied the whole as one tenement, when he made his will and died—the mill being at a considerable distance from any of the outer boundaries of the tract, on which he was actually cultivating fields, situate on the stream on which the mill was erected, above and below it. The whole then was in fact one tract and parcel, and was so considered by the testator. It cannot indeed be supposed without express or plain words of exception, that the testator meant to leave out a small parcel of two acres in the heart of a large tract of land and within the portion of it then under cultivation, for the sake of its descending to numerous collateral relations, who were as the case states, his co-heirs. If there was any other devise which could embrace it, or even a residuary clause, the claim of the defendant might be more plausibly resisted. But the words are sufficient to carry the whole to him, and the other circumstances fortify that construction.—Especially as the testator has made one exception, namely, of the family grave yard, which he no doubt intended not to appropriate to any particular relative, but to preserve to its former uses, by letting it descend to all his heirs, among whom he might well think, so small a quantity as one acre, dedicated to such a purpose would never be divided. The number of acres specified cannot make a difference. Quantity may be matter of description as in *Den ex Demise Proctor* v *Pool*, at last term, (*ante p.* 370,) or as distinguishing which of two parcels is meant, when there is no other more certain criterion. But in general it does not import to enter with the description, as identifying the parcel conveyed, more than it amounts to a covenant, that the parcel contains the quantity designated. It is by every body regarded, if not as surplusage, as too vague to be relied on as a de-

The number of acres in a tract of land is never, unless plainly so intended, a matter of description.

finite or controling description. It turns out here, that the quantity mentioned in the will is since found upon admeasurement, to be that contained in both tracts, deducting two acres. But it does not appear that the testator had surveyed the lands, or knew that to be the exact quantity, so as to render it not at all probable that he could use those terms for a different purpose, or in a different sense, from that in which they are commonly received.

We think therefore that the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

DAVID BRIGHT v. HORATIO SUGG.

It is not competent for the Supreme court to revise amendments made in the court below: as when a judgment is entered *nunc pro tunc* it cannot be reversed upon appeal, because it should have been entered at a former term.

This action was originally commenced by a warrant, and came to the County court of Montgomery on the appeal of the plaintiff. The plaintiff having succeeded in the County court, the defendant appealed to the Superior court, when, at the Spring term 1833, the judgment was affirmed, and execution issued for the amount of the verdict, and the costs of both court.

At Montgomery, on the last Fall circuit, before STRANGE Judge, the defendant moved to set aside the execution, because it had issued for all the costs, without a judgment therefore having been entered at the trial term. On the other hand, the plaintiff moved to have this judgment entered *nunc pro tunc*, which his Honor directed to be done, and the defendant appealed.

Mendenhall for the defendant.

No Counsel appeared for the plaintiff.

DANIEL, Judge.—The question in the case is, whether the defendant can be subject to the cost of the plain-

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tiff, by a judgment entered of record, on motion, at a term different from that at which the verdict was rendered.

The defendant contends that as the plaintiff appealed from the judgment of a Justice of the peace, the Superior court had not the power to order the defendant to pay the cost, unless the order was made at the term, the cause was tried in the appellate court. The defendant says that no such judgment was rendered and recorded at the time the cause was tried, which was at Spring term 1833, of the Superior Court of Law of Montgomery. At the Fall term 1833, a motion was made to enter the judgment *nunc pro tunc*, which was resisted by the defendant, because the 17th section of the act of 1794, directing the mode of recovering debts of twenty pounds and under, gives the plaintiff liberty to move the court that tried the cause for costs, only at the term the trial was had, otherwise he shall pay the costs himself. The court will in general permit a record to be amended, and a judgment to be entered *nunc pro tunc*, when it is delayed by the act of the court or the clerk, (*Bates* v *Lockwood*, 1 *Term R.* 637. *Mara* v *Quin*, 6 *Ib.* 1. *Archb. P.* 228.) There is nothing in this case which shews us, that no motion was made, or judgment pronounced for the costs at the trial term, and at the time the verdict was rendered, although not entered of record. When the record was amended by the order of the court, the judgment stood as of the trial term. The orders or rules for amendments of proceedings made by a court in the progress of a suit therein depending, do not fall within the description of any part of the record, but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the courts of law possess. The practice of the courts below, is a matter which belongs by law to the exclusive direction of that court. It is therefore left to their own government alone, without any appeal, to or revision by this court. It is not competent for a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, although the order for the amend-

ment is sent up as a part of the record. The proper object of a writ of error is to remove the *final judgment* of the court below, for the revision of a Superior Court, in order that the latter court, from the *premises* contained in the record of the inferior court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the court below. These premises are the pleadings between the parties, the proper continuance of the suit and process, the finding of the jury upon an issue in fact if any has been joined, and lastly, the judgment of the inferior court. All these premises from which such judgment has been derived, the parties to the suit below have the right, *ex debita justitia*, to have upon the record.

We think therefore, that it is not competent for this Court to examine into the propriety of the amendment, which is left to the sole direction of the Court by which it has been made. And if this be so, then the circumstance of the order for the amendment being put upon the record in this instance, cannot have the effect of giving competency to this Court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by a writ of error, and if the parties to a suit have not, *ex debita justitia*, the right to put the rules and orders for the amendment upon the record, then this Court would have or would not have authority to enquire into the propriety of the amendments, according as the inferior court did, or did not return, in each particular instance, the order by which the amendment was made. (*Mellish* v *Richardson*, 23. *Eng. C. L. R.* 276. 1 *Archb. P.* 230.) It has been here decided that an act done by the Superior court, in the exercise of its discretion, is not the subject of an appeal to the Supreme court. (*State* v *Lamon*, 3 *Hawks* 75, *Sneed* v *Lee*, *ante* 3 vol. 364, *Ballinger* v *Barnes*, *Ib.* 460, *Cannon* v *Beemer*, *Ib.* 368.) We are therefore of opinion that the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

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JAMES J. HOYLE, *et al.* v. ANDREW LOGAN.

A deed for land, which is held adversely to the vendor, passes no interest to the vendee, and he cannot maintain a *sci. fa.* to repeal a grant under which the person in possession claims.

This was a PETITION and SCIRE FACIAS to vacate a grant, which was submitted to STRANGE, Judge, at Lincoln, on the last circuit, upon the following facts.—The plaintiffs claimed under a grant to one *Cox*, dated in November 1796, for 12021 acres, and a regular chain of conveyances from the grantee to them, the last of which was dated in March 1830. The defendant's grant was issued in November, 1815, and ever since its date he had been in the actual possession of the land covered by it, which was within the boundaries of the grant to *Cox*. At the time of sueing out his grant, the defendant had no notice of the existence of *Cox's* grant.

His Honor being of opinion for the defendant, judgment was entered accordingly, and the plaintiff appealed.

No Counsel appeared for either party.

DANIEL, Judge.—This was a petition and *scire facias* to vacate a graut. The defendant made two objections wherefore his patent should not be vacated.—First, that the plaintiff's grantor had been disseised, and was out of possession, when he made the deed to the plaintiff, so that nothing was purchased but a *chose in action*. Secondly: that the right of entry of those under whom the plaintiff claimed, was taken away by seven years continued adverse possession.

The first objection is good in law. The person who conveyed to the plaintiff had been, and continued disseised in March 1830, the date of the conveyance to the plaintiffs. By the common law a *chose in action* (except in the case of the King,) cannot be assigned orgranted over, (*Lampets case* 10 *Rep.* 48 *a* 2 *Ves.* 181) and the reason of the laws not allowing such was, because it tended to champerty and maintenance, and to pass debts, and pretended titles into the hands of more powerful men, who were then able to oppress the inferior orders.

(2 *Thomas' Coke* 113.) It is an established maxim of the common law that no possibility, right, title or any other thing that was not in possession, or vested in right could be granted or assigned to strangers. (*Ib.* 456.) No right of entry or re-entry can be assigned, so that if a person be disseised, and assigns over his right to another before he has entered on the disseisor, such assignment is void. (*Ib.* 566, *note S. Winch* v *Keeley*, 1 *T. R.* 619. *Innes* v *Dunlop*, 8 *T. R.* 595.)

An actual adverse possession of seven years is a bar to a *Sci. Fa.* to vacate the grant under which the defendant holds.

In the second place the plaintiff's grantor being disseised, and his right of entry taken away by the act of 1715, (*Rev. ch.* 2 § 3.) he could not, in our opinion have maintained a *scire facias* to vacate the defendants grant, because he could not be considered such a person *aggrieved*, as comes within the meaning of the tenth section of the act of 1798, (*Taylor's Rev. p.* 193,) establishing a court of patents. Seven years continued adverse possession by the defendant, under his junior grant, (which would be colour of title) would have taken away the right of entry, and barred the plaintiff in an action of ejectment. The action of ejectment is not mentioned *eo nomine*, in the act of limitation; but that act declares when a right of entry shall be taken away by reason of an adverse possession, accompanied by efflux of time. The right of entry of the plaintiff, and those under whom he claims, is clearly taken away in this case by virtue of the statute; then what benefit would he derive by vacating the defendant's patent? The court could not in this species of action, order the possession to be surrendered, the plaintiff would still be driven to his proper action for the land, where he must be defeated by reason of the seven years adverse possession of the defendant under his junior grant. To sustain this proceeding at the instance of the petitioner, it is indispensable that he should be aggrieved by the patent which he prays to be vacated. No person can be thereby aggrieved, but he who has an interest in the subject matter of it. If it appears that the petitioner never had such interest, or if he once had it, that the same has been utterly extinguished or barred, he is then an officious intermeddler with what

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concerns him not, has no right to be protected, and no grievance to be redressed.

This decision is not in conflict with that in the case of *McRee* v *Alexander*, (3 *Hawks* 322,) which we understand to rest upon the point that a petition filed at the instance of *several* relators, may be maintained, although *one* of the relators be barred of all right to the land by the act of limitations. We feel ourselves bound by that decision, and shall steadily adhere to it.

The case of *McRee* v. *Alexander*, (3d *Hawks* 322) distinguished from this case, and approved as distinguished.

The judgment of the Court below is affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

JESSE A. DAWSON v. SAMUEL L. SHEPHERD.

A *fi. fa.* issued upon a dormant judgment is not void, and the sheriff is bound to obey it.

CASE against the defendant, the Sheriff of Martin, for a false return to a *fi. fa.* issued at the instance of the plaintiff against the goods of one *Tunstal*, and also for improperly applying the amount raised by a sale of the said goods to another execution, instead of to that of the plaintiff.

PLEA—*not guilty*.

On the trial at Halifax, on the last Fall circuit, a verdict was taken subject to the opinion of the court upon the following facts. The plaintiff's judgment against *Tunstal*, was obtained in Nash Superior Court, at the term thereof, begining on the third Monday of March 1831. At the following September term an execution issued, directed to the defendant, which was held up by the plaintiff, and never delivered. From March 1832, an *alias* issued, which came to the defendant, and on this writ the alledged misfeasance took place.

At November term, 1827, of Bertie county court, one *Thompson* obtained a judgment against *Tunstal*, a *fi. fa.* issued on this judgment returnable to February term

following, which was returned *nulla bona*. No other execution issued until February term 1832, when another *fi. fa.* came into the hands of the defendant, and was levied upon three slaves. This writ was issued without any *sci. fa.* to revive the judgment, in consequence of *Tunstal's* waiving such process. Upon the levy returned to this writ, a *venditioni* issued from May 1832, upon which the negroes were sold, and the proceeds paid to *Thompson*. The plaintiff contended that he had a preferable right to satisfaction out of those slaves, and this action was brought to recover the sum for which they sold.

His Honor, Judge MARTIN, being of opinion that the plaintiff was entitled to recover, gave judgment accordingly, and the defendant appealed.

Devereux for the defendant.

Badger contra.

GASTON, Judge.—Upon the case stated we are unable to perceive any legal grounds for the judgment rendered against the defendant. Admit that *Thompson's* execution was irregular because sued out without a *scire facias*, and admit even that this irregularity was not cured by the waiver of *Tunstal*, the defendant in the execution, upon which points it is unnecessary to express an opinion,) yet assuredly it was not therefore void. Now an officer can not only justify under an irregular or voidable process, but he is bound to execute it. (*Weaver* v. *Crier*, *ante* 1 *vol.* 337.) *Thompson's* execution therefore was an obligatory mandate on the sheriff to levy the debt of the goods and chattels of *Tunstal*. Upon what grounds could the sheriff give the preference claimed for the plaintiff's execution? We can see none unless it be that the latter purports to be an *alias fi. fa.* But it has been settled in the case of *Palmer* v. *Clarke*, (*ante* 2 *vol. p.* 354,) that an *alias fi. fa.* has no lien, as against another creditor anterior to its teste, when the original *fi. fa.* has not been delivered to the sheriff, but retained by the plaintiff in the execution.

The cases of *Weaver* v. *Crier*, (*ante* 1 *vol. p.* 337,) and *Palmer* v. *Clarke*, (*Ib.* 2 *vol. p.* 354,) approved.

We are of opinion that the judgment of the Superior Court must be reversed, and judgment rendered upon the case agreed, in favor of the defendant.

PER CURIAM.—JUDGMENT REVERSED.

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JESSE POWELL, *et. al. v.* LEMUEL COOK.

Where one put a female slave in the possession of another, and by his will subsequently made, bequeathed that slave to the same person for life, and proceeded, "after her death I give the same slave, and her increase to" &c. *Held*, that issue of the slave born between the date of the will, and the death of the testator, did not pass to the legatee for life. The case of *Jones* v *Jones*, (*Conf. Rep.* 310,) approved.

DETINUE for a male slave, named *Willis*.

The case was submitted to MARTIN Judge, at Wake, on the last Fall circuit, on the following facts.

Dempsey Powell in the year 1818, put into the possession of *Amelia Cook*, the wife of the defendant, a negro girl named *Ferebe*, who continued in the possession of the plaintiff during the life of *Powell*, the defendants using her and her issue, as their own. *Dempsey Powell* by his will bequeathed as follows : "I lend unto *Amelia Cook*, (half sister of my wife,) during her life time, "one negro girl named *Ferebe*, now in her possession, "and after her death, I give the said negro girl, and "her increase to *Polly Merril*," and thereof he appointed the plaintiffs executors. After the making of the will, and before the death of the testator, *Ferebe* had issue the slave *Willis*, claimed in the writ. *Amelia Cook* was still alive, and if the issue of *Ferebe* did not pass to her for life, then judgment was to entered for the plaintiff—otherwise for the defendant.

His Honor being of opinion for the defendant, judgment was entered accordingly, and the plaintiffs appealed.

W. H. Haywood for the plaintiffs.

Badger for the defendant.

DANIEL, Judge.—As the will did not begin to operate until the death of the testator, no right to the slave *Ferebe* was vested in *Amelia Cook*, until that time. The slave *Ferebe* only, and not her children born between the date of the will and the death of the testator, passed to *Amelia Cook* for her life, (*Jones* v *Jones*, *Con. Rep.* 310.) The subsequent words made use of by the testator in the same clause of the will which gives the slave *Ferebe*

to *Amelia Cook* for life, which words are as follows :— "And after her (*Amelia Cook's*) death, I give the said negro girl *Ferebe*, and her *increase* to *Polly Merrit*, *&c.*"—do not, by necessary implication or intendment, carry the increase of *Ferebe* as well as herself to *Amelia Cook* for life. To say they did, would, in our opinion be adding words to the will, rather than construing it, which we have no power to do.

We think that the judgment of the Superior Court must be reversed, and that judgment must be rendered for the plaintiffs.

PER CURIAM.—JUDGMENT REVERSED.

ELIZABETH OLD v. HECTOR OLD, *et. al.*

A witness to a will of land who was, at the time of his attestation, a presumptive heir to the devisor is not interested in the devise within the meaning of the eleventh section of the act of 1874, *(Rev. ch.* 204.*)*

This was an issue of DEVISAVIT, VEL NON as to a script propounded as the will of *Merrit Old*, and was tried before MARTIN Judge, at Camden on the last circuit.

The only question was, whether the will was attested in the manner required by the eleventh section of the act of 1784, (*Rev. ch.* 204.) The supposed will was attested by *William Old* and *Harriet Old*; the latter of these was a sister of the supposed testator, and was at the execution of the will, one of his heirs at law; she was also a party defendant to this issue. *William Old* proved the due execution of the will, and its attestation by himself and the other witness. The plaintiff then offered to examine *Harriet Old*, the other witness, but his Honor refused to permit this, and informed the jury that *Harriet Old* was interested in the will at the time of its execution, and therefore that it was not well executed to pass land. A verdict was returned in conformity to this instruction, and the plaintiff appealed.

Iredell for the plaintiff.

No Counsel appeared for the defendants.

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DANIEL, Judge.—After stating the facts as above proceeded:—Two questions arise in the case: first, was *Harriet Old* a good witness under the directions of the statute, to attest the will. Secondly: If she was a competent witness to attest the will at its execution, could her attestation be proved by the other witness, as she was at the trial, interested to defeat the will, and a party defendant on the record. It is declared in the eleventh section of the act of 1784, that no last will shall be good or sufficient in law or equity, to convey or give any estate in lands, unless it is subscribed in the presence of the testator, by two witnesses at least, no one of whom shall be interested in the *devise* of the said land. In the case of *Allison* v. *Allison*, (4 *Hawks*, 141.) the court determined that when the witness had an interest in the lands devised at the time of the attestation, no subsequent release could avail to make him a proper witness under the statute. The state of things at the time of the execution of the will, determines the competency of the attesting witnesses under the statute.—The witness in this case being only heir presumptive to the testator, had at the time of attestation, no interest in the lands devised. The testator could in his life time, have alienated the lands, or he might have married and had issue, which would have completely destroyed every possibility which the witness had of inheriting the lands. We think the witness had no interest at the time she attested the instrument, and therefore the will was subscribed by two witnesses; no one of whom was interested in the devise of the lands.

If the witness when called by the plaintiffs, thought proper voluntarily to testify, we cannot see any good objection against it, although she was a party defendant on the record. But if she had refused to testify, because she was a party, then the second question arises, whether her attestation may not be proved by other witnesses. It is a rule of evidence that when a subscribing witness has, since the attestation, become interested, his handwriting may be proved by other witnesses, as where he has become the administrator of the obligee, even though

he disqualified himself voluntarily by taking out administration. (*Swire* v. *Bell*, 5 *T. R.* 371, 1 *Starkie*, 338.) If one of the attesting witnesses to a will is abroad, it seems to be sufficient to give evidence of his handwriting. If a witness to a will be dead, or has become interested since his attestation, evidence of his handwriting will be received to support the will. (*McKenire* v. *Fraser*, 9 *Ves.* 5, 3 *Starkie* 1693, 1694,) and from such evidence, the jury may presume the due execution of the will, although it does not appear from the written form of attestation that the witness subscribed the will in the presence of the testator. *Hands* v. *James. Com. Rep.* 531. *Croft* v. *Pawlet*, 2 *Strange*, 1109, 3 *Starkie*, 1693.) The cases of *Hampton* v. *Garland*, (2 *Hay.* 147,) & *Cromwell* v. *Kirk*, (*ante* 3 *vol.* 355,) are in point, to show that when the attesting witnesses to the will, were competent at the time of execution, and one of them has since become incompetent, the party seeking to establish the will, is not bound to bring forward the incompetent witness. We think the opinion delivered by the Superior Court was erroneous, and therefore there must be a new trial.

An attesting witness to a will who has become interested since his attestation need not be produced by the person propounding it, but the will may be established by proof of his hand writing.

PER CURIAM.—JUDGMENT REVERSED.

HORATIO HUBBELL, *et al.* v. JOHN D. THURSTON, *Adm'r.*

A plea of an out standing bond, and *no assets ultra*, is no defence to an action of *assumpsit* for rent due upon a parol demise, the latter being of equal dignity with the former.

ASSUMPSIT, upon a parol demise of land, for rent in arrear.

PLEA—That the intestate before his death, had executed a promissory note to one R.C. for $2125, which was not due. and *no assets ultra.*

DEMURRER AND JOINDER.

On the last circuit, his Honor, Judge MARTIN, at Bertie thinking that the arrear of rent due upon a parol

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demise was equal in dignity to a promissory note, gave judgment for the plaintiff, and the defendant appealed.

Badger, for the plaintiff.

Iredell contra.

DANIEL, Judge.—After stating the pleadings as above proceeded:—By the act of 1786, (*Rev. ch.* 248, § 2) promissory notes, and accounts signed by the debtor, are made of equal dignity with bonds and specialties, in a course of administration. In 11 *Vin. Ab.* 289. *pl.* 26, the question was whether rent due upon a lease-parol, paid by an executor, should be a good discharge to him, against an obligation of the testators. It was objected that debts by specialty are of a higher nature than debts without specialty, and therefore the executor, having paid this rent which was not due by specialty, had paid it in his own wrong, so long as there were debts owing upon specialty. But the whole court were of opinion, that it was well enough; and that rent, though it be upon a lease-parol, is of as high a nature as an obligation. That an obligation taken for rent, did not extinguish the rent. (*Phillips* v. *Lee* 1 *Freem. Rep.* 262, *pl.* 283.) In *Godfrey* v. *Newport*, (*Comb.* 183, 4 *Mod.* 45.) the court held that the rent being in the realty is of as high a nature as a bond, for no wager of law lieth. Debts due on lease by deed, and debts on bond, are in equal degree, and that lease by deed, and a parol lease are in in this case the same. (*Gage* v. *Acton*, *Carth.* 511, 12 *Mad*, 291.) The contract remains in the realty, notwithstanding the term has expired, and the right of distress gone. (*Newport* v. *Godfrey*, 3 *Lev.* 267.) Rent arrear on a parol lease, and unpaid by the testator, is equal to a debt by specialty, for this savouring of the realty, and maintained from receiving the profits of the land, the executor can no more wage his law against such a debt, than he can against a debt by specialty. *Ergo*, it is more than a mere personalty. (3 *Bar. Ab.* 82. *Wilson's edition.*)

From these authorities it appears that the question is completely settled at common law, and there is no act

of Assembly which alters the common law in this particular.

We are therefore of opinion that the judgment should be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

WYRIOTT ORMOND v. IVEY GIBBS.

Where a testatrix gave specific legacies to her sons W. D. and S, and after directing the residue to be divided between them, proceeded: "but in case either my sons, D. or S. die, leaving no lawful issue then living, then my son W. and the surviving one to have his part of all that is willed to him, and in case they should both die leaving no lawful issue then living, then my son W. to have the whole of what I have willed unto each of them," and S. died leaving issue, and then D died without. *It was held*, 1st. That the specific legacy given him as well as his share of the residue was subject to the limitation over, and 2d. That W. alone succeeded, as their was no limitation in favor of the issue of S.

This was an action of DETINUE for several slaves, and the only question being upon the construction of the will of one *Mary Jordan*—the following case agreed was submitted to DONNELL Judge, at Hyde, on the Spring circuit of 1833.

The will was as follows:

"I will unto my son *Wyriott Ormond, Willis, Violet,* "and *Sam*, to him and his heirs forever."

"I will unto my son *Daniel W. Martin, Reuben, Nell,* "*Vester, Nice, Sylvia and Charity*, with all the increase "of *Nell*, two feather beds, and two hundred dollars to "him, and his heirs forever.

"I will unto my son *Seth B. Jordan, Solomon, Andrew,* "*Edy*, and *Sukey*, two feather beds, to him and his "heirs forever."

"The remaining part of my estate not willed away, "I will unto my three sons *Wyriott Ormond, Daniel W.* "*Martin*, and *Seth B. Jordan*, but in case either of my "sons *D. W. Martin, or S. B. Jordan* die, leaving no "lawful issue then living, then my son *Wyriott Ormond,* "and the surviving one to have his part of all that is

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"willed to him, and in case they should both die, leaving no lawful issue then living, then my son *Wyriott* "*Ormond* to have the whole of what I have willed unto "each of them."

Seth B. Jordan died leaving issue, and afterwards *Daniel W. Martin* without issue. The slaves demanded are those which were given to him by the will of *Mary Jordan* above set forth.

If under these facts the plaintiff was solely entitled to the slaves, judgment was to be entered for him. If he and the children of *Seth B. Jordan* were entitled to them jointly, then judgment was to be entered for them, in another action, in which they were joint plaintiffs, but if the slaves vested in the plaintiff, and the personal representatives of *Seth B. Jordan*, then in both actions judgment of nonsuit was to be entered.

His Honor being of opinion that the plaintiff was exclusively entitled, gave judgment accordingly, and the defendant appealed.

No Counsel appeared for the defendant.

Devereux for the plaintiff.

RUFFIN, Chief Justice.—We approve of the construction put upon this will by the Judge who tried the cause. The expression, "his part," embraces perhaps literally by reason of the words added "of all that is willed to him," the whole property bequeathed to the legatees respectively, in the former part of the will, as well as that given in the residuary clause. But certainly upon a reasonable intendment, all is embraced. There is a limitation over upon certain events. It was much more likely that this was meant of the specific and valuable chattels bequeathed, than of the residue merely, which may have consisted, and probably did, of but few articles, and those of so little value, and so perishable as not to be worth preserving in the family. The case of *Doe ex dem Gibson* v *Gale*, (9 *Eng. C. L. R.* 218,) is not so strong as this, and shows this to be the proper signification.

Upon the other point we do not think that the words

are to be construed as creating a condition precedent to be strictly and literally complied with, before the remainder can vest, or rather the second estate arise.— The absolute property is given in the first place, and then in certain events limited over, by way of executory disposition, which we must suppose the testatrix intended to take effect, as far as it could, whenever the first estate either in the whole or a part of the property should fail. It is plain this was the actual intention, for the present plaintiff is the favorite throughout. His legacy is absolute, and not to go over to any person in any event, and he is to succeed upon the death of one of his half brothers, without leaving descendants, to his share with the survivor, and upon the death of both under like circumstances, to the whole. It seems clear then, that whenever one of them should die, not leaving issue, his share was to survive at all events, and the only question is to whom. The answer is *Wyriott*, and the other brother, if the latter then "survived," but if he was *not* a survivor then *Wyriott* alone. This follows necessarily from these two circumstances: that it was the positive purpose, evidently, to limit over the estates of all the sons except *Wyriott*, upon their respective deaths without issue, though the persons to take in those events depended to a certain extent on a contingency, and the survivorship of *Wyriott* forms no part of that contingency. His interest is to vest at all events, whether he be dead or alive, when one or both of the brothers die. As to him the only contingency is, that the first taker should be dead not leaving issue; as to each of the others there was a further contingency, that *he* must be living, when the one whose share went over died. The inability of *Jordan* or *Martin* to succeed to any part, cannot also exclude *Wyriott*, because upon the death of both of the others, the whole was to belong to him or to his representatives, and therefore he takes whatever in the event, neither of the others could take. The real question is, whether the limitation over is absolute, and upon the single contingency of the first taker leaving no issue at his death, upon which it would seem there cannot be two

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opinions. That being established, the rest follows of course. There is no disposition in favor of the issue of one dying before, and therefore they cannot take—nor can his executor, because there never was any thing in him to be transmitted to the executor. The exclusion of *Wyriott* from any part, is only in favor of the surviving brother, and there being none such, he takes the whole.

PER CURIAM.—JUDGMENT AFFIRMED.

MARY MORTON, *et. al.* v. ISHAM EDWARDS.

Where a testator by one clause of his will gave his daughter two slaves absolutely, and by a subsequent clause gave her another, and proceeded as follows, "which negro together with those I formerly lent her, at her death, to be divided between her children." *Held*, that parol evidence that the slaves mentioned in the first clause had, before the making of the will, been lent by the testator to his daughter was admissible, and that fact being established, that the second clause reduced her property in them to an estate for life, with a remainder to her children.

DETINUE for five slaves, tried on the last circuit before NORWOOD Judge, at Person.

PLEA—*non detinet*.

The plaintiffs claimed title to the slaves under the will of *William McGehee* their grand father. By the third clause of his will, the testator devised as follows: "I give and bequeath unto my daughter *Martha Morton* two negroes, named little *Ben* and *Amey*." By the thirteenth as follows: "*Martha Morton* to have a negro "of seventy pounds value, which negro, together with "those I formerly lent her, at her death to be divided "between her children."

Martha Morton died in the year 1832, leaving the plaintiffs her children. The slaves demanded in the writ were *Amey* and her issue. The plaintiffs proved that in the year 1801, the testator lent *Amey* and little *Ben*, to *Martha Morton* and her husband. The defendant claimed under a sale made to him in November 1810 by

George Morton, the husband of *Martha*, and contended that by the will of the testator, an absolute interest in *Amey* was given to *Martha Morton*, which vested in her husband.

His Honor instructed the jury that if they should find that the slaves *Amey* and little *Ben* were the same slaves which had been lent by the testator to his daughter before the execution of the will, that by the thirteenth clause an interest for life only in the slaves, vested in *Martha Morton*, and an absolute interest in remainder in the plaintiffs, which would enable them to sustain this action.

A verdict was returned for the plaintiffs, and the defendant appealed.

Winston and Norwood for the defendant.

W. A. Graham for the plaintiffs.

DANIEL, Judge.—After stating the will of the testator, and the facts above set forth, proceeded :—In construing a will, the intention of the testator, if consistent with established rules of law must be observed, and no part to which a meaning or operation can be given, shall be rejected.

A will is not to be construed by adverting to a single clause only; every thing bearing on the subject which is to be discovered from the will itself, must be taken together, in order to ascertain the testators intention. Parol or extrinsic evidence, is admitted, not to control a will, but to show either with reference to what it was made, or to explain a latent ambiguity. (*Bengough* v. *Walker*, 15 *Ves.* 514.) Therefore parol evidence was in this case admissible, to show that the slave *Amey* was one of those referred to by the testator in the thirteenth section of his will, by the words, "which negro, and *those I formerly lent her*, at her death to be equally divided between her children." The evidence did shew that the slave *Amey* was one of those the testator had lent to his daughter *Martha*, and therefore fell within the bequest to her children after her death, by the thirteenth section of the will. And the evidence likewise

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showed that she was the same slave *Amey*, that was given in the third section of the will to *Martha Morton*. The question presents itself, whether the testator, having made a general bequest of the slave *Amey* to his daughter by the third section, could by the subsequent thirteenth section, limit any interest in the said slaves by way of executory devise to her children? If the same slaves had been given absolutely to the children by the latter section of the will, which had been given to the mother by a former section, the mother and children would have been tenants in common according to the decision of this Court in the case of *Field* v *Eaton*. (*Dev. Eq. R.* 283.) The slaves bequeathed being identically the same in both clauses of the will, and the Court looking through the whole will to find out the meaning and intention of the testator, feels no difficulty in pronouncing that intention to be, that *Martha* the daughter, should have an estate for life only in the slaves, by virtue of the third section of the will, and that the after limitation by way of executory devise to her children, in the thirteenth section was good in law. It is a doctrine which hath prevailed at all times as to wills, that where there is a gift of property, and a subsequent limitation inconsistent with the former, as an absolute and complete deposition of the thing, *that* does by necessary implication cut down the former limitation. (*Wykham* v. *Wykham*, 18 *Ves.* 421, 422.) We think the judgment rendered in the Superior Court should be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

CHARLES S. MOORE v. WILLIAM WATSON.

An account stated in the handwriting of the defendant, does not estop him from showing that the settlement only ascertained the items of the account, and left him at liberty to contest the price at which they were charged.

ASSUMPSIT for work and labour done, and materials furnished.

At the trial before MARTIN, Judge, at Bertie, on the last circuit, on *non assumpsit* pleaded, the plaintiff produced an account containing the items of his demand and their amount, under which was set forth, in the hand writing of the defendant, a credit for a sum of money paid by him, and the balance due the plaintiff, after the deduction of the credit. The defendant then offered to prove that these entries were made by him at the foot of the plaintiff's account, subsequently to the bringing of the action, upon an express agreement between the parties that the work charged therein was admitted to be done, but that the defendant denied the value thereof, and was to be at liberty to contest this value on the trial. This evidence was rejected by the court, and the plaintiff having obtained a verdict and judgment for the balance so claimed, the defendant appealed to this court.

No counsel appeared for either party.

GASTON, Judge, after stating the case as above, proceeded as follows:—It is insisted here, on the part of the defendant, that the rejection of this testimony was erroneous. We believe that this exception is well taken.—This is not a case where the parties have reduced their contract into writing, and parol evidence is offered to explain, vary or contradict it. The entries or memoranda at the foot of the account, being in the handwriting of the defendant, although made subsequent to the action, and after the parties were at issue upon the matter in controversy, yet furnish presumptive evidence of his admission of the correctness of the charges therein contained, and is therefore admissible testimony to establish an antecedent contract. But the circumstances accompanying the making of these entries ought to have been received, in order that the force of this presumption might be properly estimated, and correct inferences drawn from it by the jury. The presumption was one of fact, and not of law. The instrument had no conclusive force which in law estops a party, and excludes the truth.

PER CURIAM.—JUDGMENT REVERSED.

June, 1834.

James Broghill v. William Wellborn.

A non-resident creditor cannot, under the act of 1777, (*Rev. ch.* 115, § 27,) attach the property of his debtor in this State, when the latter has not absconded, nor removed to avoid the ordinary process

Whether a non resident creditor can attach the property of an absconding debtor resident in this State. Qu.

This was an attachment obtained by the plaintiff against the defendant.

At Wilkes, on the last circuit, the following facts were stated in the shape of a case argued and submitted to Strange, Judge. If upon them, the plaintiff was entitled to proceed, the suit was to progress; if otherwise, then the process was to be dismissed.

Neither of the parties were citizens of this State, and the attachment, upon the oath and application of the plaintiff's agent residing here, was levied on the property of the defendant in this State: it not being pretended, that the defendant had removed out of the State, secretly or fraudulently, or with a design to avoid the ordinary process of law.

His Honor dismissed the attachment, and the plaintiff appealed.

No Counsel appeared for either party.

Daniel, Judge.—According to the case made and agreed to by the parties, we think the opinion pronounced in the Superior Court, was correct.

The act of 1777, (*Rev. ch.* 115, § 27,) declares that, "when any person who shall be an *inhabitant* of any other government, so that he cannot personally be served with process, shall be indebted to any person, *a resident of this State*, and hath any estate within the same, any of the justices may grant an attachment against the estate of such *foreign person, &c.*"—The plaintiff is not a resident of this State, and does not come within the purview of this section, and therefore he was not authorized to attach the estate or property that might be found here, which belonged to the defendant who was also an inhabitant of another go-

vernment. It is not pretended that the defendant left the State secretly, fraudulently, or with the design to avoid the ordinary process of the law. Therefore we are not called on to give an opinion whether a non-resident creditor could attach the estate of an absconding *debtor*, by virtue of the twenty-fifth section of the said act. In putting a construction on a section of the attachment act of the State of New-York, which section is very similar to the twenty-seventh section of our act, the court said, "it is very well to give our own citizens a remedy over the property of their absent debtors, but it would be harsh and impolitic to extend this remedy to strangers, who might pursue the property here for the sole purpose of seizing it, and by this means drive its owner to a settlement on very unequal terms, or compel him to litigate in a distant forum, when perhaps both parties, residing near each other, ought to be left to apply to the tribunals of their own country." (In the mater of *Fitzgerald*, 2 *Cains, Rep.* 315.) In this case, now before us, it seems that the plaintiff was not authorized by the act of Assembly, to issue an attachment against the estate of the defendant, and the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

LEMUEL M. PETTIJOHN, *Adm'r*,
v.
ROBERT BEASLEY, *et al.*

Slaves of an infant *feme*, held in common with others, pass to her husband *jure marito*, although they were hired out by her guardian before the marriage, and the husband died during the term.

The cases of *Whitaker v. Whitaker*, and *Granbery* v. *Mhoon*, (*ante* 1 *vol. pages* 310 and 456,) approved.

This was a PETITION for the division of sundry slaves originally filed in the county court of Chowan. The plaintiff claimed as the administrator with the will annexed of *Valentine Beasley*, whose title was as follows:

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Pettijohn v. Beasley.

The testator in the year 1833, married *Harriet Beasley*, who then was, and still continued an infant. At the time of the marriage, the wife was entitled with the other defendants, also infants, to several negroes, who had been hired out by their guardian for that year.—The testator died before the expiration of the year, for which the slaves were thus hired, never having had any actual possession of them.

His Honor, Judge Martin, upon these facts, at the last term of Chowan Superior Court, directed a division of the slaves to be made according to the prayer of the petition, and the defendants appealed.

No Counsel appeared for either party.

Daniel, Judge.—The point of law raised in this case, has been decided by the court in favor of the plaintiff in the two cases of *Whitaker* v. *Whitaker*, (*ante* 1 *vol. p.* 310,) and *Granbury* v. *Mhoon*. (*Ib.* 456.) In these cases, the court said that the possession of the owner of slaves is not disturbed by the hiring—that the occupancy of the hirer is consistent with it, and does not divest it. The hirer is a mere bailee or *locum tenens* for the owner, and only holds the property for her. It is not changed from a *chose* in possession, to a *chose* in action. The owner has such a possession that she may, if of age sufficient, either sell or give the property, and it would pass. The marriage therefore was a complete gift of the individual share of *Harriet* in the slaves in question to her husband; and that share was vested in possession, as well as in right in him. *Harriet* and the other defendants being tenants in common of the slaves, did not alter the case, for the possession of one tenant in common of a chattel, is in law, the possession of all the tenants in common.

The opinion of this court is, that an undivided part of the slaves mentioned, belong to the plaintiff as administrator, and that he has a right to have partition of them in this way, by virtue of a late act of Assembly. We are of opinion that the interlocutory order of the Supe-

rior Court was correct, and order it to be so certified to the Superior Court of law of Chowan county, and that court will proceed in the case to a final judgment.

PER CURIAM.—ORDER AFFIRMED.

DEN *ex dem.* MARGARET BARFIELD,

v.

EBENEZER COMBS, *et. al.*

The deed of a *feme covert* does not bind her, when her private examination was taken under a commission by one commissioner only, and when she was neither a resident of another county, aged, nor infirm.

The acts of 1715, and 1751, (*Rev. chs.* 3 and 50) construed by DANIEL, *J.*

EJECTMENT, and at the trial before DONNELL Judge, at Wayne, on the last circuit—the only question was, whether the lessor of the plaintiff was estopped by a deed made by her, and her then husband, to the ancestor of the defendants for the land in dispute. This deed was in all respects formal, and the objection was to the mode in which the privy examination was certified. It was dated in April 1798, and at the ensuing October sessions of the county court was proved, and the following certificate endorsed upon it. "Then was the "within deed of sale from *Frederick Barfield*, and *Mar-*"*garet* his wife to &c. proved in open Court by the "oath of *Ezekiel Slocomb*, and ordered to be registered.

In October 1831, after the commencement of this action *Ezekiel Slocomb* who was the attesting witness, and also a justice of the peace for the county of Wayne, certified upon the deed, that "in pursuance of an order of the "county court made at October term 1798, authorizing "and requiring me to take the private examination of "*Margaret Barfield* a *feme covert*, wife of &c. touching "the execution of the within deed &c: I, the said *E. S.* "being then and there a justice &c. did proceed to exe-"cute the said commission, when &c. (the date of the "deed,) the said *M. B.* being privately examined by "me, separate and apart from &c. concerning the exe-

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"cution of the said deed, did acknowledge that she ex-"ecuted the same freely, and voluntarily, and of her "own accord, and without the control or compulsion of "her said husband."

At the next term of the county court, this certificate was returned, and an order made reciting the fact that the return of the private examination of the *feme* was omitted to be recorded, and directing it to be recorded *nunc pro tunc*.

His Honor thinking that the deed did not divest the estate of the wife, a verdict was returned for the plaintiff, and the defendant appealed.

Henry and Mordecai for the defendant.

J. H. Bryan contra.

DANIEL, Judge, after stating the case, proceeded:— In England, the usual, and almost the only safe method whereby a *feme covert* can join in the sale, settlement, or incumbrance of her real estate, is by a fine or a common recovery. And a married woman will not be allowed to levy a fine, or suffer a recovery unless jointly with her husband, except under very particular circumstances, as it would be voidable by the husband, or even by herself or her heirs. (2 *Bla. Com.* 355.) In levying a fine, the husband and wife must make an acknowledgment that the lands in question are the right of the complainant or *cognizee*. This acknowledgment must be made openly in the Court of Common Pleas, where the *præcipe* is actually sued out and returned, or it must be made before a judge or commissioners authorized to take the acknowledgment out of court, by virtue of the Statute 18 *Ed.* 1 which judge or commissioner is bound to examine the *feme covert* privately, whether she does it freely, or by the compulsion of her husband. (2 *Bla. Com.* 350, 351.) When a fine is levied according to law, it concludes the wife, and bars her of any right she may have in the land, and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion of her husband. (2 *Bla. Com.* 355. A judgment in a real action brought

against husband and wife, bound the wife when she became discovert and forever, therefore when a feigned action of this description was brought, the judgment in which was to bar the wife forever, the law would not permit that judgment to be rendered, or a record of the *fine* to be made, before the fact was ascertained by a private examination whether the *feme covert* freely consented to the conveyance of her land. (3 *Thomas' Coke*, 610, 716, *note.*) After the settlement of the colony of North Carolina, the method of conveying lands by fine and recovery was never used here, as appears by a declaration to that effect, in the preamble of the act of 1715. (*Rev. ch.* 3.) The Legislature in establishing a method of conveyance, by which *femes covert* might pass their lands, kept in view the precaution which was used in England, to prevent the wife from being imposed on, and compelled to part from her lands, by the force, fraud, or contrivance of her husband. The act of 1715, therefore enacts, that sales hereafter made by husband and wife, and *acknowledged* before the chief-justice, or *the Court* of the precinct, where the land lieth, the wife having been first privately examined before the chief-justice, or one of the associate judges, or by some *member appointed* by the court of the precinct, whether she acknowledgeth the same freely, shall be as good as if done by fine and recovery. This act, not extending to a *feme covert* who resided out of the State, or who was so aged or infirm that she could not travel to court, or to the judge, and the precinct courts having been changed to county courts, the Legislature passed another act in the year 1754, (*Rev. ch.* 50,) which enacts that all conveyances in writing, and sealed by husband and wife for any lands, and by *them personally acknowledged* before the chief-justice, or in the court of the county where the land lieth, the wife being first privately examined before the chief-justice, or some members of the county court, appointed by the said court for that purpose, whether she doth voluntarily assent thereto, and registered, shall be valid, as if done by fine and recovery.

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The third section enacts, that when the husband shall acknowledge the execution of the deed, or it is proved by the oath of one or more witnesses before the chief justice, or county court, where the land lieth, and it shall be represented that the wife is a resident of any other county, or so aged or infirm, that she cannot travel to the chief justice, or county court to make such acknowledgments as aforesaid, the judge or county court may make an order to direct the clerk of the county court where such land lieth, to issue a commission to two or more commissioners for receiving the acknowledgment of any deed of such *feme covert*. After they have examined her privately and apart from her husband, touching her consent, and certified her consent to the county court to which the commission is returnable, the deed shall by order of the county court, be registered with the commission and return, and shall be as effectual as if personally acknowledged before the chief justice, or the county court. It is apparent by reading these acts, that the Legislature, in analogy to the law relating to *femes*, meant to restrain the wife from conveying her lands, without the concurrence of her husband, and likewise to restrain the husband from alienating the lands of the wife without her consent freely given. To protect her in her rights the Legislature required that she and her husband should, (if within the State, and she could travel,) personally acknowledge the execution of the deed before the judge, or before the county court, when she was to undergo an examination separate and apart from her husband, touching her full and voluntary consent to such conveyance. This mode of alienation is likewise in analogy to the practice of acknowledging title to the *cognizee* in a *fine*. There the husband and wife were compelled to make a personal acknowledgment, either in court according to the rules of the common law, or before the judge or commissioner of *fines* by virtue of the statute. If the acknowledgment made by the wife is in the county court, the member of the court appointed for that purpose, takes the *feme covert* aside, separate and apart from her husband, and private-

ly examines her as to her free consent in executing the deed. If she acknowledges that she executed it of her free will and consent, the examining member of the court immediately returns, and reports to the court verbally her examination, whereupon the court orders the clerk to enter the report of her private examination on the record, and then further orders, that the acknowledgment, the report of the private examination and the deed itself shall be registered, which order is fully entered of record. Mrs. *Barfield* did not personally acknowledge in open court the execution of the deed under which the defendant claims the land, either with or without her husband, neither was she privately examined by any member of the court, in the verge of the court, as to her free consent to the execution of the said deed. It cannot be pretended that the certificate of *Slocomb* is of any avail under the third section of the act of 1751, there is no representation that Mrs. *B.* was a resident of a foreign country, or that she was so aged or infirm that she could not travel to court to make her personal acknowledgment, nor is there any commission from the court signed by the clerk, and if there had been both a representation of age or sickness, and a regular commission, it could not have been executed by one commissioner, for the law protects the rights of the wife, by giving her the assistance of at least two commissioners, in those cases which are embraced in the third section of the act of 1751. The principles of the case before the court are within the cases of *Den ex dem Burges* v *Wilson*, (*ante* 2 *vol. p.* 306.) and *Whitehurst* v *Hunter*. (2 *Hay.* 410.) We are of opinion that the judgment of the Superior Court was right, and must be affirmed.

A return to a commission made thirty years after its execution, is a nullity.

The cases of *Den* v. *Wilson*, (*ante* 2 *vol. p.* 306, and of *Den* v. *Hunter*, (2 *Hay.* 401,) approved.

PER CURIAM.—JUDGMENT AFFIRMED.

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THE PRESIDENT AND DIRECTORS OF THE STATE BANK
v.
F. C. ARMSTRONG, *admr. of* JOHN ARMSTRONG, *et. al.*

Where a dealer with a bank had a balance to his credit upon a general cash account, and died indebted to it by judgment, and upon simple contract, the bank has a right, independent of the statute of set off, to apply the balance to the latter debt.

This was an action of DEBT upon a judgment obtained by the plaintiffs against the intestate of the defendant *Armstrong* in his life time, and the other defendants, the latter being in fact his sureties. The judgment declared on was $3046. The only dispute between the parties arose upon the plea of *payment*, and upon a notice of a *set off* for the sum of $930, given at the trial before SEAWELL Judge, at Cumberland on the last circuit.

Sundry payments were admitted by the plaintiffs, and a verdict was taken for $3136,14, to be reduced to the sum of $1855,80, if the Court should be of opinion that the defendants were entitled upon the following facts, to have the sum of $930 applied to the judgment declared on, either as a payment or a set off.

John Armstrong was clerk of the county court of Cumberland, and kept his cash with the plaintiffs, at their office in Fayetteville, and dealt with them as depositors usually do with their bankers. (Some particulars of the mode in which this dealing was conducted is contained in the opinion of the court, and need not be here stated.) Of the cash thus deposited with the plaintiffs, the sum of $930 never had been paid to *Armstrong* in his life time, neither had he ever made any specific application thereof to this, or to any other debt he owed the plaintiffs. *Armstrong* died on the 20th of July 1827, and his administrator on the 19th of September following, called at the banking house of the plaintiffs, and drew a check for the balance abovementioned, and demanded its payment to him. This was refused by the cashier, who assigned as a reason therefor, that *Armstrong* owed the plaintiffs a large sum for money paid into his office in his life time, upon executions in their favor, and that he

had been directed to retain the balance at the credit of *Armstrong* on account of this money. *Armstrong* did in fact owe the plaintiffs, for money received by him as clerk, the sum of $2300, and two or three weeks before his death had, upon being called on by the cashier of the plaintiffs for payment, promised to come to the banking house and settle the amount, but had never done so.— The administrator never made any other demand for the said sum of $930, neither had he ever given any directions to the plaintiffs as to its application.

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On the 22d of October 1827, the plaintiffs sued out process upon the official bond of *Armstrong* assigning as a breach thereof the non-payment by him of the sum of $2300 abovementioned. On the trial of this action they allowed the defendant credit for the sum of $930, the balance of *Armstrong's* cash account, and the sum now in dispute. But his administrator who was the sole defendant, did not consent to this credit, on the contrary he expressly declared his dissent thereto, and notified the attorney of the plaintiffs that he should insist upon applying it as a part satisfaction of the judgment on which this action was brought. This notice was disregarded by the plaintiffs who took judgment only for the balance claimed by them after deducting the said sum of $930.

Directly after the demand made by the administrator for the payment of the said sum of $930, he brought an action of *assumpsit* against the plaintiffs for its recovery, in which he was non-suited at the Fall term 1829, of Cumberland Superior Court. He immediately brought another action for the same sum, in which he was again nonsuited at the Fall term 1832 of the same court; within a year thereafter he sued out a third writ for the same sum, which was returnable to the term of the court when this suit was tried, and which was, at the trial, in the hands of the Sheriff.

His Honor was of opinion, "that it belonged exclu-"sively to the defendant, the administrator of *Arm-*"*strong*, to avail himself of the benefit of the deposit, "and that it was not in the power of the plaintiffs, who

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"were to be regarded as debtors to that amount, to say in "what manner they were to pay it, except in an action "against them to recover it. Here the Bank was plaintiff "to recover a debt due to it, and it belonged to the defen- "dant to avail himself or not of the deposit, and conse- "quently he might exercise his election as to what cross "demand he would apply it. That if he could not ap- "ply it as a set off, the conduct of the Bank in refusing "payment of it, it being a debt due from it, left it in his "power, if he thought fit, to treat from that moment, "the money paid to the Bank on deposit, and thus re- "fused to be repaid, as a payment to whatever demand "the Bank had against him, and that he had the right "to assert it by plea when sued. Therefore the deposit "must be allowed either as a set off or payment."

Judgment being entered accordingly, the plaintiffs appealed.

Henry and W. H. Haywood for the plaintiffs.

Badger contra.

GASTON, Judge.—The plaintiff brought an action of debt against the administrators of *John Armstrong*, *Thomas Armstrong*, *John Hodges*, *William Hodges*, and *Robert Campbell*, to recover the amount of a dormant judgment which had been rendered in their behalf against the intestates of these defendants. The matters in controversy were embraced in the issue joined on the pleas of payment and set off. Upon these issues the jury returned a verdict ascertaining the balance due on the judgment, subject to the opinion of the Court upon a case agreed. This case presented the question whether, upon the facts agreed, the defendants were, or were not entitled to a further credit of the sum of $930, which was claimed by them, but not allowed in the verdict.—Upon this question the decision of the Court below was in favor of the defendants, and a judgment having been rendered for the plaintiffs for the residue of the sum mentioned in the verdict after deduction of this credit, they appealed to this court.

The material facts in relation to the disputed credit

are briefly these. The late *John Armstrong* for many years before his death kept an open account with the plaintiffs as his bankers. He died on the 27th July 1827, and on the face of this account there was then a balance in his favor of the aforesaid sum of $930. About a fortnight before his death, he was called on by the plaintiffs to account with, and pay over to them moneys which the Sheriff of the county had paid over to him as clerk of the county court, for the plaintiffs. He promised to do so, but died without accounting or making payment. The sum due to the plaintiffs on this account was $2400. Besides this debt, he also owed jointly with the persons herein before named, the large judgment which is the foundation of this action. Neither of these debts was charged in the running account. On the 19th September 1827, his administrator applied at the Bank, presenting a check in favor of himself for the sum of $930, and demanded payment thereof. The officers of the institution refused to pay this check, and claimed the right to apply the balance appearing due to his intestate to the satisfaction *pro tanto* of what his intestate owed, because of the money of the Bank received from the Sheriff. The administrator immediately thereupon commenced an action of *assumpsit* against the Bank, and on the trial thereof was called and nonsuited. He renewed the action, and upon the trial was again nonsuited. He then issued a third writ which has not yet been executed on the plaintiffs. On the 22d day of October 1827, the plaintiffs instituted an action on the official bond of *Armstrong*, which was tried at the same term with this suit, and obtained a judgment for the residue of the money so received by him as clerk after a deduction of the sum of $930, which they applied in part discharge of that claim. This application of the said sum was not assented to, but on the trial was protested against by the administrator. On the 23d of July 1829, the present suit was brought.

A debt due to one of several defendants by the plaintiff, cannot be pleaded as a set off.

It is clear that the disputed credit cannot be allowed as a set off, waiving all other objections to it as such, there is a want of that mutuality between the debt demanded and the debt which the defendants opposed to it,

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which is indispensable under the statute of set off. A debt which is due from a plaintiff to one defendant only, cannot be set off to a joint demand against two or more defendants.

It remains to be considered whether upon the facts agreed, the law pronounces that this sum of $930 has been paid in part satisfaction of the judgment which is the foundation of this action. Whatever claim the late *John Armstrong* had against the plaintiffs, it arose not from *special* but from *general* deposits. He had not placed in the custody of the officers of the Bank, money in bags or boxes to be kept distinct from the funds of the Bank and to be returned to him in *specie*. Had this been the case the identical money so deposited, would have remained his property in their hands as his bailees. If lost or destroyed without fault of the depository the loss would be that of the depositor. If not so lost or destroyed, he would have had a remedy against the plaintiffs upon an improper refusal to return it, by detinue or trover, as for an unlawful detention or conversion of his proper goods. The deposits were general.

They consisted, (as appears from the account made a part of this case,) either of money, or of the notes of the Bank, or of notes of other Banks, or of the checks of other dealers upon the Bank, or of the proceeds of bills or notes discounted for him. They were incorporated into the mass of the funds of the plaintiffs, became their property, and entitled him to a general credit for the amount thereof in account. Upon a settlement, the plaintiffs were bound honestly to account with him for that amount, and faithfully to pay over any balance which on such settlement should be found rightfully due. They were undoubtedly entitled to charge him with whatever sums they had paid to him, or to his checks to others, and with such other disbursements and demands, as by the agreement of the parties, or by the nature of their dealings, or by the known usages of the institution, or by the law of the land, were proper debits in such a running account. Had the plaintiffs the right as against *Armstrong*, upon his refusal to pay over to them monies which he had received to their

use, to charge this in the account to the extent of his funds in Bank? There can be no question but if the Bank had paid off a note or acceptance of his, payable at the Bank, this would have constituted a proper debit in the account. It is not to be doubted also, but that they had a right to apply his funds in their hands to the payment of any note or acceptance of his, held by them. (*Rogers* v *Ladbroke*, 1 *Bingham* 93, 8 *Eq. C. L. Rep.* 260.) Upon the examination of the account referred to, we find that the very first debit is, "*June 3d* 1819 *to note* 180," and that regularly afterwards, so long as he obtained discounts, that is to say, up to April 22d 1827, his notes are charged off in account, as they become due, or as his means in Bank by discounts or otherwise become adequate to meet them. We see also that according to the course of dealing between the parties, he is charged in account with other money demands, as for example, "January 27th 1827, *Brown & Cameron's judgment* $610 25." From the nature of this account, as an open running account of the cash transactions of the parties, embracing a variety of receipts and payments, debits and credits, from the manner of their dealing with each other, and upon common law principles wholly independent of the statute of set off, we think that either has a right to *retain* for, or to *charge in account* against the other, money received by the latter for the use of the former, so that the balance thus ascertained shall be the *true debt*, and the parties neither driven to cross actions nor obliged to set of, against each other, as for mutual unconnected demands. (*Dale* v *Sollet*, 4 *Bur.* 2143, *Green* v *Farmer*, *Ib.* 2221.) But if the decision of the question rested upon this point we should consider it further before we come to a *definitive* determination. We can decide it more satisfactorily to ourselves upon other grounds which I proceed to state.

It is not questioned that if *Armstrong* had demanded payment from the Bank of this apparent balance in his favor, the Bank could refuse upon the ground of the set off which they had against him, because of their money received from the Sheriff, and had he attempted by ac-

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tion of *assumpsit* to enforce a recovery of this balance, they could have barred his recovery by pleading this set off. As *Armstrong's* administrator succeeded precisely to the rights of his intestate, whatever was the rule of right as between the plaintiffs and the intestate, became the rule also between the administrator and the plaintiffs. But while this is conceded, it is denied by the defendants that the plaintiffs could apply this balance as a *payment* on account of this particular demand, without the assent of *Armstrong* or his administrator, because the two demands were *unconnected*, originating and continuing in distinct transactions, forming opposite debts, recoverable by separate and opposing actions, and not permitted to balance each other, except by a judgment of court rendered with respect to them when brought forward under the defence of set off. If this be indeed the rule which governs the transaction, and by the force of which the plaintiffs cannot apply the money due to *Armstrong's* estate, as a payment of the demand they have against it for the money *Armstrong* held of theirs, we are unable to see how under the same rule these defendants can, without the assent of the plaintiffs, apply the former demand as a payment of *the judgment* upon which they are sued. There is *at least* as little connexion between the disputed item and this judgment, as between that item, and the demand against *Armstrong* for the money paid him. In fact there is much less, because as we have seen, the two last are not even mutual demands, and cannot be opposed to each other upon the plea of set off by the defendants.

The argument by which the defendants endeavour to sustain this their asserted right, is understood to be this: the money standing on the running account to the credit of *Armstrong* at his death, was the money of his administrator, and he had the right to apply it as he pleased. The refusal of the Bank to let him have the control of this money, gave him an election to consider it as cash paid to the Bank. There were two demands of the plaintiffs against his intestate, and of course against the administrator as the representative of that intestate. A

debtor making a payment, has the right to apply the sum paid, to either of the demands of the creditor, and the debtor here, by the plea of payment to this action, has directed the application to this debt. We have felt ourselves bound to consider this argument attentively, not only, because of the respect due to the able counsel who argued it, but because of the still greater respect due to the decision which is supposed to sanction it, and which the appeal brings before us for review. The result of that examination has not been to satisfy us of the correctness of the argument.

The balance of a general cash account, due by a Bank to a depositor, is a *debt* which may be set off to any claim of the bank against the depositor, and is not *money* which the latter may apply at his election, to either of those claims.

However for some purposes the phrase may be allowed, that the balance on the running account in favour of *Armstrong* at his death, was *the money* of his administrator, we have seen that legally speaking, it was *not his money*. Such balance was evidence that the plaintiffs *owed that amount* to the administrator, and a refusal to pay it upon demand, unless such refusal were made for sufficient reason, rendered the plaintiffs liable to the administrator, because of a breach of the *assumpsit* which the law infers from such indebtedness. If the claim of the plaintiffs against the administrator were so connected with this balance appearing due on open account, that both were items in one continued dealing, then the refusal to pay was rightful, because in truth there was nothing due. If however these mutual claims were unconnected, the plaintiffs had a right to refuse payment, because they had a proper set-off. A debtor who makes an actual payment with his own money has a right to direct its application, because *it is his money*, and he alone has the legal control over it. But a *creditor* has no right to direct his debtor to apply the sum due him to any one of two cross demands which that debtor may have against the creditor. The money in the hands of the debtor is yet *his* money, *he* has the legal control of it—its *specific* application cannot be ordered by the creditor, and the right of opposing a set-off, and if so, of selecting the set-off which he will thus oppose, is the right of the debtor. We do not therefore see that the refusal of the Bank to favor the administra-

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tor's check, gave him a right to regard the *sum checked* for, still less the whole apparent balance, as so much money then paid to the Bank.

If this view be correct it is unnecessary to pursue the train of reasoning further. A fallacy we think has insinuated itself into it at its commencement, which unavoidably leads to error in the result. But if the administrator could be regarded as having the right to consider the money standing to the credit of his intestate as a *payment* to the Bank, and of directing its application—when ought he, and when did he direct the application? The judgment of the Court is, that it was thus applied on the 19th September 1827, because of the refusal of the Bank then to pay his check, and of the election declared by him at the time of the plea pleaded. The record shews that the plea of payment was first put in at June Term 1832. There appears *no plea* referring distinctly to this disputed item until at the term of trial, when the administrator of *John Armstrong* pleads fully administered, and "gives notice of a set off for $930." It is perfectly clear, that *in fact* the administrator did not direct the application of this disputed item as a payment on the 19th of September 1827. He presented a check for $902 payable to *himself*. The Bank refused the check, because they claimed the right of retaining for the satisfaction of one of their demands. It was not a controversy for which of the two demands the Bank should retain, but whether it might retain for their claim against *John Armstrong*, or should not retain at all.

The application of this balance to the judgment debt was not urged, nor so far as we see, thought of by either. If the refusal of the Bank gave *him* the right to direct the application, he did not then exercise that right. Instead of imputing this amount to either of the demands of the plaintiffs, he required it to be paid over to himself. It is not stated as a fact, nor is there any fact set forth from which it can be inferred, that the administrator treated this as a *payment* by him, or by his intestate, or claimed that it should be so regarded for several years afterwards. He immediately instituted an

action to recover this amount as a debt due him from the plaintiffs, and after repeated nonsuits, he to this day, perseveres in claiming it as a debt. If the occurences at the time the check was refused, either of themselves, or connected with the election at the time when payment was pleaded to this action, can convert the amount withheld by the Bank, into a payment, then it must be regulated by the law applicable to such a payment, that is to say, a payment by a debtor to a creditor having two demands, without any direction as to its appropriation. In such case, the rule is settled, that the creditor may then make such appropriation as he pleases. We are saved from the necessity of enquiring how the law would have applied it, in case both the debtor and creditor had at the time declined to make an appropriation, (an enquiry which in many cases is not free from perplexity,) because the election of the plaintiffs was expressly announced at the moment, and has ever since been invariably adhered to.

I am instructed to declare the judgment of this court, that the court below erred, in rendering a judgment in behalf of the plaintiffs for the sum of eighteen hundred and fifty five dollars and eighty cents—that the said judgment ought to be reversed on account of this error—and that the plaintiffs are entitled to have judgment pursuant to the verdict of the jury, for the sum of three thousand, one hundred and thirty-six dollars and fourteen cents, and their costs in the court below, with interest on $2314 50 cents, from the time of the rendition of the judgment in the Superior Court of Cumberland, until paid. The appellants are also entitled to recover their costs in this court, to be taxed by the clerk.

PER CURIAM.—JUDGMENT ACCORDINGLY.

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THE PRESIDENT AND DIRECTORS OF THE STATE BANK
vs.
MOSES A. LOCKE AND JANE TROTTER.

A condition in the bond of the Cashier of a Bank "to account for, settle and pay over all monies, &c." is tantamount to a condition for "good behaviour;" and if it were not, a clause in the charter, prescribing the latter condition, is only enabling, and does not preclude the insertion of the former.

The cases of *Benford* v. *Alston*, (*ante page* 351,) and of the *State Bank* v. *Armstrong*, (*Ib. page* 519,) approved.

This was an action of DEBT, commenced in November 1830, upon a bond, made by the defendants in the penalty of $50,000, dated the 27th day of December, 1815, with the following condition: "Whereas, the above "bound *Moses A. Locke*, has been appointed Cashier of "the Salisbury Branch of the State Bank of North-Ca- "rolina, now therefore, the condition of this obligation "is such, that if the above bound *Moses A. Locke*, shall "and does well, truly, honestly and faithfully, demean "and behave himself in the said office and capacity of "Cashier of the said Branch, and shall and does fully, "fairly, justly and honestly account for, settle, and pay "over all monies which he ought to account for, settle "and pay over, in virtue of his office, as Cashier, "then &c."

Three breaches were assigned: 1st. That on the 19th of April, 1816, the Cashier of the Bank of Newbern, paid into the hands of *Locke* as Cashier, in an order, on the State Bank, at Raleigh, the sum of $1355, with direction to pass it to the credit of the Bank of Newbern, as a deposit, and that *Locke* did not so enter it, but negligently and unfaithfully omitted to do so, and concealed the fact that the said deposit had been made.

2d. That *Locke* remained in office until August 1821, when he resigned, and that he was then bound to settle with, and pay over to the plaintiffs all monies then in his hands, or which ought to have been in his hands, belonging to them, and was required so to do, but that he

failed to pay over or account for the said sum, and unfaithfully and improperly concealed and withheld the same.

3d. That *Locke* in the year 1830, upon being requested to pay to the plaintiffs the said sum of $1355, refused so to do.

The defendants severally pleaded as follows:

1st. *Non est factum.*

2d. Payment *ad diem, et post diem.*

3d. Performance of the condition, and that *Locke* had committed no breach of his duty.

4th. *Accord* and *Satisfaction.*

The defendant *Trotter* also pleaded several special pleas in substance as follows: That *Locke* had, although he received the sum of money in the pleadings mentioned, often rendered accounts in writing to the plaintiffs of his official transactions, which purported to be true accounts of the sums received by him, and were approved and passed by the plaintiffs, and that on his resignation in 1821, he rendered a final account, which was also approved and passed, and that he fully paid the balance that thereupon appeared to be in his hands, and that the plaintiffs without wilful default and neglect, might have known, at that time, that the said sum of $1355 was not included in that account, and had not been paid over; and also, that the said accounts were false and fraudulent; yet the plaintiffs neglected to require further payment or account from the said *Locke*, for two years after passing the said account, and also neglected to give the defendant any notice of such default in said *Locke*, for more than ten years as aforesaid.—By which *laches*, and by reason of the premises, and because the defendant was altogether ignorant of any default, the said defendant was discharged from all liability on the bond, for the default alleged by the plaintiffs. In other pleas by the same defendant, the same matter was relied on, accompanied with averments that the plaintiffs and their officers had, at the time of passing *Locke's* accounts, notice that he had received the money mentioned in the declaration, and that it was not includ-

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ed in his accounts, and also knew of other errors and omissions and false entries in them, and yet for a long time, viz: more than ten years, neglected to give notice thereof, to the said defendant, whereby, and inasmuch as she was ignorant, without her own default, of any default in the said *Locke*, she became discharged &c.

On the trial, before his Honor Judge NORWOOD, at Rowan on the last circuit, the plaintiffs proved very clearly the receipt by *Locke*, of a certificate of deposit in the State Bank at Raleigh, which was, by the Cashier of the Bank of Newbern endorsed to him, and directed to be placed to the credit of the Bank of Newbern. This certificate was produced, and was by *Locke* charged to the mother Bank, but no corresponding credit had been given the Bank of Newbern. *Locke* in the balance sheet made out by him, when he resigned, stated the Bank of Newbern to be debtor to the State Bank at Salisbury, for $1018, and received credit accordingly; when had the money now in dispute, been passed to its credit the balance sheet, would have exhibited it as creditor, to the amount of $317. It was admitted that during the time *Locke* continued in office, sundry accounts current had been furnished by him to the plaintiffs, and also to the Bank of Newbern, which had not been objected to.—Accounts had also been furnished to the Bank of Newbern, by his successor, up to a recent date. The plaintiffs offered to prove, that in 1830, the Bank of Newbern had claimed and received credit for the omitted sum. This evidence consisted of an account then first rendered by that Bank, and of its allowance by the plaintiffs. This testimony was objected to by the defendants, and was rejcted by his Honor.

The Cashier of the plaintiffs, at the Branch Bank in Salisbury, proved that soon after he heard of the claim of the Bank of Newbern for an additional credit, he called Mr. *Locke's* attention to the subject, and asked an explanation, and was informed that unless he, *Locke*, had paid the amount of the claim into the office of the Bank of Newbern, at Charlotte, he did not know how to account for it.

For the plaintiffs it was insisted, that they had a separate cause of action, whenever a breach of the official bond occured. It was argued for them, that the omission by *Locke* to enter the proper credit to the Bank of Newbern, in the year 1816, was a breach.—That another breach was committed, in *Locke's* not making a full settlement in 1821, and another, in not paying the sum in dispute in 1830, when his attention was called to the claim of the Bank of Newbern, then made. For the defendants it was contended, that the bond on which the action was brought was void, and if not void altogether, that the second condition for accounting was void. That the cause of action accrued in 1816, and as more than thirteen years had elapsed before the writ was sued out, a presumption of satisfaction arose, which was not rebutted by any testimony which had been offered. And further, as there was no proof that the plaintiffs had paid to the Bank of Newbern, the money demanded in this action, they were not entitled to recover it.

His Honor instructed the jury, that the bond was not void in whole or in part. That the plaintiffs had a good cause of action, whenever a breach of the bond was committed—that three several breaches being alleged, if the plaintiffs failed to establish all of them, they could recover upon such as were supported by proof. That as to the breach assigned, as having occurred in 1816, the law raised a presumption of payment, but that if they were satisfied that the error was not discovered until the year 1830, this was a circumstance to rebut that presumption. That if the Bank of Newbern retained the accounts current, without objection, a presumption arose that they were correct; but that this presumption might be repelled.

His Honor also charged the jury, that as to the breach assigned as having taken place in 1821, the presumption of payment did not arise, as the suit was commenced within less than ten years from that time—that as to the breach alleged to have taken place in 1830, the defendants having stipulated by deed, that *Locke* should account with and pay the plaintiffs their monies in his hands, no

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demand for such account and payment was necessary, or if one was neceesary, that made in 1821 was sufficient. And finally his Honor, leaving it to the jury to enquire whether the plaintiffs had established any of the breaches assigned, informed them, that if this had been done, they ought to find for the plaintiffs, although there was no proof that the money had been actually paid by them to the Bank of Newbern. The jury returned a verdict for the plaintiffs, in which they found all the issues against the defendants, except those joined on the special pleas of the defendant *Trotter;* to these they did not respond at all. Judgment being rendered on this verdict, the defendants appealed.

Nash, for the defendants.

Badger, for the plaintiffs.

Ruffin, Chief-Justice, after stating the case as above, proceeded:—Upon the trial, several points were made by the defendants, on which his Honor gave opinions, in which it is insisted there was error, to correct which, is the object of the present appeal.

There is no dispute about the receipt of the money by *Locke* from *Stephens*, the Cashier of the Bank of Newbern, nor that it was his duty to enter it as a deposit to the credit of *Stephens* as Cashier. But the court having rejected evidence, offered by the plaintiffs, of the recent of payment of the money by the State Bank to the Newbern Bank, it was insisted, that without proof of such payment, the plaintiffs could not recover in this action.

The defendants also prayed the court to pronounce the bond void, either wholly or in part, as not being authorised by the charter, but contrary thereto. On both points, the decision was against the defendants.

Money received by the Cashier of a Bank on deposit, becomes the property of the Bank, and he is accountable to the latter for it, altho' it is never re-paid to the depositor.

On the first, nothing scarcely need be added to what was observed as to the nature of Bank deposites in the case of *the State Bank* v. *Armstrong*, (*ante page* 519.) The money, when received by the Cashier *Locke*, became incorporated into the mass of property which belonged to the plaintiffs, and which by the

plaintiffs was confided to his care. It was not, in his hands, the money of the Bank of Newbern, nor his own; but was the money of the State Bank, for which that institution, and not *Locke*, was responsible to the depositor. When he left the office, he was bound to leave there all that had been deposited there, to enable his employers to meet the engagement assumed through him. It is therefore immaterial whether the depositor has called, or shall ever call upon the plaintiffs for the money. The right of the plaintiffs depends upon its having been paid into the Bank, and upon *Locke's* having withdrawn it for purposes not those of the Bank. The argument cannot be admitted for a moment, that when a Cashier withdraws from a Bank, he has a right to carry with him all the money in deposite and keep it until the Bank shall have satisfied the depositors. With what are their demands to be satisfied, when the Cashier has the funds?

The second objection arises under the general issue and is founded on the sixth fundamental article of the ninth section of the Bank charter. The words of it are: "Every Cashier, before he enters upon the duties of his "office, shall be required to give bond with two or more "sureties to the satisfaction of the directors, in a sum not "less than $10,000, with condition for his good beha-"viour." The terms of the bond on which this suit has been brought have been already mentioned. It is insisted, that a corporation is bound to act in strict conformity to its charter, and that acts and contracts not authorised by it are void, or at all events, those are which do not conform to the charter, in those cases in which the charter does prescribe particularly the form or subject matter of the contract; and that here the second provision for settling and paying over the monies, is an addition to that mentioned in the charter, and avoids the whole bond, or at least, that the matter added is void.

The objection supposes that the bond taken, varies substantially in the condition from that mentioned in the act, for it is not supposed to be argued that it must be confined to its very words. That would make it al

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together inoperative, since the act does not say in so many words, in what respects, or as to what duties the Cashier shall be of good behaviour. The variance is supposed to consist in the difference between "good behaviour" and "accounting, settling and paying over all monies"—the former only referring to integrity, and the latter including capacity, diligence, and ability to pay. The authority on which this distinction is taken, is the case of the *Union Bank* v. *Clossey*, (10 *John.* 271,) in which that doctrine is laid down, and it is held, that overpaying a check by mistake was not a breach of a bond "well and truly to perform the duties of the office of teller."

The breach here, is the omission of the plain duty of entering on the books of the Bank a credit to a customer's account, by means of which omission, the Cashier was enabled to escape being charged, as between himself and the Bank, with the sum which ought so to have been credited, and also enabled to retain to his own use, until it was a long time afterwards otherwise discovered. This could not, we think, be good behaviour, in any sense of that term. If he was not obliged duly and skilfully to enter the credit according to the approved methods of book-keeping, he was at least obliged, as a man of integrity, to enter it in some way. But to us it seems, that the construction of those words. contended for by the counsel, is not the true one. The object of the Legislature was to have the institution secured in the performance of all the acts which were incumbent on the Cashier as duties. The State took a large interest in the Bank, and private citizens embarked their money in it, at the invitation and upon the faith of the State. It cannot be supposed that mere honesty of purpose, or rather the absence of dishonest intentions, on the part of the Cashier, was all the State meant to require, but further, skill, diligence, punctuality—for these qualities are necessary to the duties on the discharge of which the success, nay the existence of the institution essentially depended. The doctrine of the case from New-York cannot prevail over these reasons, if that doctrine were

such it is supposed to be. In the case of *Minor* v. *the Mechanic's Bank of Alexandria*, (1 *Peters' Rep.* 46,) it was held that the words, "well and truly execute the duties of the office of Cashier," includes not only honesty, but skill and diligence. These words are the same as those in the bond sued on in "*the Union Bank* v. *Clossey;*" which was then cited and relied on. But the doctrine of the case in New-York, is not that supposed, as we think. The case before the Court was that of a mistake in the Teller, and found to be really such, in the count of money. It may be true that those words do not form a guaranty against all mistakes, or imply the utmost and perfect, but only reasonable capacity and diligence; and therefore that an act which even a careful and very competent person may commit, would not amount to non-performance. But until the mistake be shewn on the part of the defendants, the omission to make any entry whatever, cannot be regarded as good behaviour, and the omission to account for the money in any way, cannot but be considered as a culpable omission. So that the breaches here, appeared to be breaches of that part of the condition which does conform to the charter; as well as of those which are more specific as to the particular duty of payment. Nor do we think these latter words import that the Cashier shall pay, at all events, all the monies that might come to his hands, so as to insure against accidents, robbery, or the like. If they were not qualified by other words in the bond, they would be subject to a reasonable construction, according to the subject matter, and receive a sense consonant to the previous general provision relative to good behaviour, so as to make the obligation to account, an obligation for faithful accounting. But they are expressly qualified. The Cashier is to account for, settle and pay all monies, "which *he ought* to account for, settle and pay over *in virtue of his office.*" This is not adding a duty beyond good behaviour, but only the expression of one of the particulars, which constitute that general duty, and which cannot vitiate the obligation, in respect of the previous words.

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If, however, the provision had been a new and substantive one, out of both the words and sense of the charter, we should still think it binding. It is true that a corporation is the mere creature of the law, having no natural existence, and therefore no original power to contract. That power is necessarily derived from the charter. But it does not follow, that the charter must specify every contract that may be made by the corporation, or the mode and form in which it shall be made. As a matter of necessity, its capacity to contract is only said to arise out of the charter, because the origin and existence of the corporation—the ideal being which contracts—are derived from, and depend on the charter. But when once called into existence by law, its power to contract generally, or only to make particular contracts for specified purposes and in specified forms, will depend upon the purposes of the incorporation, and the enabling and restraining clauses in the charter. When the charter is by statute, as here, expressly creating certain persons, when associated, a body politic in law and in fact, able and capable in law to purchase and possess estates, real and personal, to a certain amount, and "generally, to do and execute all acts, matters and things, which a body politic in law may, or lawfully can"—there is given to this impersonal being the general faculty of contracting, which persons by law have, though the mode of contracting may be different. To these words however, are added, "subject to the rules, regulations, restrictions and provisions hereafter prescribed and declared," and in the ninth section it is subjoined that the following rules, restrictions, limitations and provisions, shall form the fundamental articles of the constitution of said corporation, among which is the provision, before quoted, for taking Cashier's bonds.

To shew that within the intention of the Legislature, the capacity of the corporation to make each particular species of contract, does not require an express grant, it is only necessary to advert to the phraseology of this article. It requires the Cashier to give bond in not less than $10,000; yet it does not profess to confer on the

corporation the power to take it payable to itself, nor to take one in a greater penalty, though it is apparent that the sum mentioned is not adequate security in a Bank with so large a stock, and that the Legislature expected that a larger would, and ought to be required.

But the argument is, that the words are restrictive, and that a contract not conforming to it, is void. The effect of this argument, if sound, would be serious. The appointment of the Cashier would itself be avoided, and as the Bank can only deal and be dealt with through agents, and he being illegally inducted, is not the agent, and all contracts through him would be null. This consequence would go far to prove the reasoning fallacious. We deem the construction contended for, not to be the true one. The clause seems to us not more restrictive on the corporation than it is enabling. The object was not to impart the faculty of making a contract with the Cashier and two sureties for him, for his faithfulness in office, and to make the appointment of one without bond void; nor was it to restrain the general faculty before imparted, to that of taking security in a particular sum or form. Another purpose was in view. The act incorporates all the subscribers to the Bank, including the State, as the largest stockholder. It then vests in the President and Directors, as a select body of the corporators, powers which make that board, as it were, the acting corporation for the ordinary purposes, and general management of the corporate affairs. The intention was to guard the mass of the stockholders from the assumptions, negligence or mistakes of that select body, as well as the mal-practices of the agents by them appointed, as far as was practicable. The same protection was requisite for the State and each member of the community, as being concerned in the credit and soundness of the institution. Hence, by the eighth section of the charter, it is enacted that the Directors of the principal Bank shall have power to appoint Directors for the branches, and such officers under themselves, as well as the branches, as shall be necessary for the business, and shall be capable of exercising

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such other powers and authorities for the well-governing and ordering the affairs of the corporation, as shall be fixed and determined by the laws and ordinances of the same; which bye-laws are not to be contrary to law, and subject to the restrictions of the charter. Then follow a number of provisions in the next section, which are called fundamental articles of the constitution of the corporation. They are obviously of different natures. Some of them prescribe the mode of action, and limits to the powers of the whole body of stockholders, such as the times of general meeting, the mode of voting, and the scale of votes, and the number of Directors to be chosen for the principal Bank. Others, relate to things which neither the whole body can authorise, nor the select body do, with or without such authority; and others, obviously impose duties on the Board of Directors, as practically conducting the business, or declare limitations on that body in the exercise of those functions.— Thus in the course of their trading, they are forbidden to hold real estate, except under certain circumstances; to contract debts beyond a fixed sum; from dealing except in specified articles; from committing usury; from making loans to the United States or a State; from withdrawing the capital from the branches. They are required to make dividends, to submit a state of the Bank to the Stockholders in general meeting, to appoint Directors and officers of the branches, and to cause discounts to be made, and deposites to be received there, upon the same terms as at the principal Bank, to cause the Cashiers to make weekly statements to the Board of the condition of the Bank, and to furnish the Treasurer with a similar statement, when required, not exceeding one in three months.

These are obviously functions of a Board of directors, and therefore the mandates concerning them are to be considered as spoken to that board. So of the duty of taking bond from the Cashier. The Directors appoint that officer by the express provision of the charter.— They therefore are to take the security, which he is required to give. If the Board fail to take any security,

or such as is prescribed, it is criminal in the persons composing that body, and they would be amenable, probably, to the State and to the whole corporation. It may be too, that at the election of the State, upon a judicial proceeding, the charter might be adjudged forfeited for such disobedience to the law in even this small portion of the corporation, as the board is in possession of the funds of the whole corporators, and exercises *de facto*, according to its chartered organization, the most important of its franchises. These questions however, are not at all involved in this cause, and even the hypothetical solution of them, either in the affirmative or negative, must not be considered as intimations of an opinion upon them. But admitting that the Board ought to take the security, and that the members of it are responsible for not doing so, and taking it for granted that the sovereign might hold all the stockholders to be involved in the default of those, to whom the sovereign requires them to commit their affairs; yet the enquiry recurs, whether an officer thus appointed by the Board of Directors, would not be liable to the action of the whole corporation, for any wrongs committed by him, or upon any contract entered into by him with the whole corporation. If his appointment be illegal and void, it is nevertheless incredible, that he may under color of it, get the funds and effects into his hands, and defy the world. The corporation is not *de facto*, upon such a breach of duty by the Directors, dissolved; and until dissolved, may prosecute all those who do it wrong, and enforce all contracts entered into with the corporation itself. If for instance, deeds for lands, contrary to the statute, were taken, they would be valid as against the vendor. If not, the charter is an absurdity; for if void the charter could not be violated in that respect, since the Bank could never acquire the estate, the acquisition of which constitutes the offence. A Cashier, like another wrong-doer, would be liable in trover, for the effects in his hands, if they could be identified. If they consisted of monies not identified, there is as little doubt that he would be liable in assumpsit, for money had and receiv-

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ed, as other persons are, who get money of another without consideration. In thousands of instances, corporations have had judgments on counts for money had and received. If a Bank send money by an individual to another Bank, and he convert it, or one steal it, surely it is impossible that there is no remedy for such a wrong. If the party be liable for money had and received, it is a case of implied contract. The law supposes every contract it implies, to have been in fact made; it infers that the promise was made, because it ought to have been. But it never thus inferred, if in law it could not be made between the parties. If these positions be true, and a corporation can, as it has often done, maintain assumpsit for money had and received to its use, then although the Board of Directors, may have violated a duty incumbent on that body, by not taking a proper bond, the whole corporation may yet have redress upon any other contract, proved or presumed, by which the Cashier has become bound to the whole corporation for his transactions, particular or general. A liability on a promise to pay a particular sum, does not stand on a different footing from one on a covenant and bond to cover all sums, which he has received, or may receive. There is an ability in the whole corporation to make a contract of either kind, and the liability depends on the terms of each contract. Here the Cashier has been admitted into office, and has possessed himself of the assets of the corporation, and has given a bond, which, in its terms, covers the demand; and he is therefore bound by it. The true purpose of the fundamental article was to require the Cashier to give a bond, and to require the Board of Directors as a body, distinct from the mass of the stockholders, and from necessity, entrusted with their interests, to take a bond payable to the whole corporation. This requisition is addressed peculiarly to the Board, for the protection of the other corporators, including the State.—it is mandatory to that body, but a compliance by that body is not a condition, of which the performance must be shown, to give the corporation itself an action upon a contract with it. The clause is not an enabling one

to the whole corporation to make the contract described in it, nor is it restrictive of the general faculty of the whole corporation; chartered for the purposes of banking, and as an instrument of commerce, and providing a circulating medium, which will avoid a contract with it in another form. It is therefore the opinion of the Court that the jury was properly instructed upon this point.

The next error alleged relates to the case made under the pleas of payment. The money was received in 1816, and was never entered in account. While Mr. *Locke* remained in office, the books and papers of the Bank were open to the Directors, and he rendered to the Board weekly statements; and upon his resignation in 1821, a particular account was made up, from which his successor settled with him, when he fell in arrear, a considerable sum, which has since been discharged. This sum of $1355, not appearing on the books, was not brought into that settlement; and was not discovered until 1830, when Mr. *Locke* was asked for an explanation, and said he could make none, unless he had paid it to the Newbern Bank at Charlotte.

His Honor charged the jury, that a presumption of payment arose from the lapse of time, between 1816 and 1830, but that it was repelled, if the error had not been discovered before 1830: that each of the breaches assigned in the declaration were distinct causes of action, and if the plaintiff failed on that of 1816, there might yet be a verdict on that of 1821, for not paying over the money; and that as to this last, the time being less than the ten years before this suit, there was no presumption of payment.

The court has been somewhat embarrassed by the manner in which these propositions were stated in the Superior Court. We do not agree in the opinion, if, as it seems, it was meant to lay down, that one, having a distinct and complete cause of action touching an entire sum, ascertained at a particular day, and being barred of that action by the presumption of payment, from efflux of time since that day, can, because the lia-

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bility arises on a covenant or bond, with a condition to account, by a subseqnent demand, create a new breach and a new cause of action, and thereby avoid the effect of the time, and former presumption altogether. Upon the proof, the demand upon each breach, is substantially for the same sum of money. Although the plaintiff may fail on one, and recover on the other, and to that extent they are distinct; yet upon the evidence, the whole sum only can be recovered on all or either. The same debt therefore is demanded in each. Now the presumption we are speaking of, is that of *payment*. If the money is *once paid*, there is nothing more to be demanded, and so there cannot be a second breach committed by the non-payment on the second demand. This presumption of payment supposes it was made at the beginning of the time, for it is the lapse since, that puts the proof of the debtor's power, or raises the inference against the creditors, that he would not have waited so long, if he had not received satisfaction. We should therefore have held it erroneous to say, that as to the non-payment in 1821, which is one of the breaches, there was no presumption in favor of the defendants, if it were true, that such presumption ran as to the breach of 1816. It is indeed correct to say, that the time does not raise the presumption, that the money was paid in in 1821, because it is less than ten years. But there would be a presumption that it was paid before, namely in 1816, when the first breach in relation to this same sum is alleged. We concur indeed with his Honor, that the whole presumption is rebutted by the ignorance of the error, and therefore if the case were before us, on a motion for a new trial, because the verdict was unjust, or against evidence, we should refuse it. But it is reviewed here for error in law, and we are unable to see whether the jury found the verdict upon the breach in 1816, because the presumption was rebutted, or upon that laid in 1821, because against that there was no presumption. We are however led upon reflection to conclude that the first error in the Superior Court, con-

sists in supposing, that there was in either case the presumption contended for; and that the jury ought to have been told there was nothing to raise it.

The fact pleaded, is payment or satisfaction. It is said that it is established by the lapse of time. That rule is familiar in its application to bonds, merely for the payment of money, or doing particular acts on a day or days certain, or even on demand. Then each party knows his rights and obligations, and they are distinctly unconnected and in opposition as debtor and creditor. But when one is bailiff or receiver of the other, there is during the continuance of that relation, and until an accounting between them as to their transactions up to the period embraced in the account, no legal presumption, as an arbitrary and settled rule of law, that the receiver has paid to the principal all the monies or any particular sum before received for him.—Why? Because the duty of the receiver is, in that case, not merely to pay to the other the money as a debt which he owes him; but it is also, until demanded, to keep it for him as his money. Until an accounting and some payment thereon, the presumption is that the Cashier of the Bank did *not* pay the money to the stockholders or for the use of the corporation, as between them. There was no person to receive it but himself, and therefore it remained in his hands. That presumption becomes a certainty, if his own accounts, which he was bound to keep truly, contained no entry of such payment during his agency, nor even an acknowledgement by him that he has received the money, which he now contends must be deemed, upon mere presumption, to have been paid by him, while thus in office. It is manifest, we think, that there is nothing for such a presumption to rest on. The only possible reliance the defendants could have on time, was the presumption, not of satisfaction, but that the demand itself never existed; that the money was never received. That would have been a legitimate argument, though it would probably have availed but little against the direct written evidence under his own hand. That however would be

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altogether a presumption of fact, with the decision of which, by the jury, this court could not intefere. No question was made on it at the trial, or alluded to by the Judge. Upon the question made, it is thought clear by this court, that until the defendant *Locke* ceased to be Cashier, there was no presumption that he paid to the plaintiff any monies of which entries do not appear on the books kept by him; but on the contrary, that, as it was his duty to keep those monies, the presumption is, as against himself, that he did keep them and has used them. When he gave up his office and came to a settlement with his successor, that settlement raised a presumption that all demands were then included, or had before been settled, until the contrary appears. And as to the presumption from time, on which alone the question was raised in this case, it did not begin before the settlement. But the day of the settlement is in our opinion a *punctum temporis*, at which the parties hold the relation of debtor and creditor, and that only; and from which alone any presumption of satisfaction could now run, and from which it did arise and would protect the defendants, if the time had been long enough and there had been nothing to repel it. But being less than ten years, it was in itself insufficient. We speak of that settlement as the first accounting, because there is no evidence of any other. It was urged in argument indeed, that there was a weekly accounting. But that is surely a misapprehension: at least we cannot understand the case in that way. The "weekly statements," spoken of by the witnesses, must be those statements mentioned in the fourteenth fundamental article in the charter. They are "*statements* of the amount of stock of the particular office and of the debts due the same, of the monies deposited therein, of the notes in circulation, and of the cash in hand." This does not mean a detailed account of all the items composing those general accounts, such as a list of the debtors and depositors and a description of the money, upon which the board is to settle with the Cashier. But only a balance sheet, or what is familiarly called in Banks or

among merchants, *a state of the Bank* or of the House, by which the aggregate amount of its assets and engagements may be seen, and its present cash means appear. The use of it is simply to enable the persons engaged in the management of the Bank to regulate the discounts for the day and order its general dealings for the ensuing week. It purports to shew what the condition of the Institution is, according to the books, and what it ought to be, upon the supposition that all its debtors are good and its officers faithful. But it supposes nothing as to those facts, nor does it purport to be an account between the Bank and the Cashier, nor to prove that the money that, according to it, ought to be in the Bank, is there. It is not an account *to* or *with* the Bank; but is a compendious account *of* the Bank, as the Cashier says it is, precisely of the same character with that required by the same article, in the same words, to be rendered by the officers to the Treasurer for the information of that officer and the Legislature, upon which no particulars appear or are expected to appear.

There was certainly no necessity for a further demand; as that implied by accounting, in 1821, was for every thing.

The remaining question is on the defect of the verdict in not responding to the special pleas. If those issues be material, the verdict is imperfect and there must be a *venire de novo;* but if immaterial, the jury would have found for the defendants on them unnecessarily, and the plaintiffs would still have been entitled to judgment *non obstante verdicto*.

Upon the defence constituted by the facts as pleaded or as proved, in another court, we do not propose to make a suggestion. But upon its sufficiency at law, we have not the least doubt or hesitation. The pleas are substantially taken from those in the *Trent Navigation Company* v. *Harley* (10 *East.* 34.) That case is an authority directly against them. Lord *Ellenborough* unfortunately dropped the observation, that "none of the pleas appear to have been proved in fact," which it is

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feared has led to some mischief. But if they had been proved in fact they would have been unavailing. Baron *Wood*, on the trial, ruled that the case made in the plea was no defence at law, and it came on in the King's Bench on a rule for a new trial for that error. The counsel for the plaintiff were stopped; and the court held clearly, that no *laches* of the obligees, in not examining the accounts or not calling on the principal, was an estoppel to proceeding at law against the sureties. No such estoppel was known of. This is precise authority upon the point, that one who is surety by obligation, though his character appear in the instrument, cannot avail himself of *laches* by the creditor, at law at least, if he can in equity, for *laches* is neither performance nor a release, and all the obligors are bound alike. In *Bultrel* v. *Jarrold*, (8 *Price's Exchequer Rep.* 467.) an action of debt was brought in the Court of Exchequer on a recognizance of bail entered into by *Bultrel* as bail of *Rowe*, and the defendant pleaded that the plaintiff without his privity, came to an agreement with *Rowe*, whereby he gave him time and was to receive payment in goods, which were consigned to him accordingly. It was held bad on demurrer, because such a parol agreement with the principal could not discharge the obligation arising on matter of record. Upon this judgment error was brought in the Exchequer Chamber, where it was affirmed. Error was again brought in the House of Lords, where it was again affirmed in 1820, without a dissent on the part of any Judge; and Lord *Eldon* remarking that the plaintiff in error, must seek his remedy in equity. That court can enquire into the solvency or insolvency of the principal, when it took place, whether the surety has an indemnity or has been injured by either laches, or the insolvency, or only by his own negligence. In 1821, the case of *Davy* v. *Pendergrass*, (5 *Barn. & Alder.* 187,) was decided in the King's Bench, accordingly. It was debt on bond, executed by S. & J. P. and the defendant as surety, with condition to pay within one month after demand of such balance, not exceeding £500, as upon settlement between

the plaintiff and principals, S. and J. P. should appear to be due the plaintiff for coals to be delivered to S. & J. P. The breach was the non-payment of a sum thus demanded. Oyer and plea, that the plaintiffs had by parol agreement, without the privity of the surety, given time to the principals to pay by instalments, and taken a warrant of Attorney to take judgment, and issue execution for the whole upon default of payment of any instalment. On demurrer, there was judgment for the plaintiff. The whole court went on the ground, that that debt arose by deed in which the principal and sureties bound themselves for the same act and nothing would discharge it as to one which would not as to the other. It was distinguished from mercantile or parol contracts, as guaranties, bills of exchange, and the jurisdiction of bail bonds, under the statute. It was not performance, for then the principal himself might plead it; nor a release being *in pais*. Nothing *in pais* can discharge an obligation but performance or satisfaction. The remedy upon all such agreements is in equity, as it is in the case of laches. These authorities fully support the opinion we entertain, and on which the court founded the judgment in *Binford* v. *Alston*, at last term. The case of *The People* v. *Janson*, (7 *John.* 332,) is a respectable authority to the contrary; but it is not sufficient to change the common law. It has not met with the decided approbation of the profession in New-York, and is shaken by the subsequent case of *The People* v. *Berner*, (13 *John.* 383,) in the same State; and the Supreme Court of the United States denied its correctness, and refused to follow it in *United States* v. *Kirkpatrick*, (9 *Wheat.* 737.) The courts in this State, have never yielded to the innovation, but have steadily held to the settled rule of the Common Law.

PER CURIAM.—JUDGMENT AFFIRMED.

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DEN EX DEM. ISAAC T. AVERY v. NATHAN ROSE.

The requisition of the act of 1798, (*Rev. ch.* 492,) amending the Revenue Laws, as respects the land tax, must be strictly complied with by the Sheriff, or the estate of the owner is not divested, and where land was, under the fourth section of the act, stricken off to the Governor, and the Sheriff, instead of executing his deed, at the County Court succeeding the sale, as the act requires, did it at a subsequent term, the deed is inoperative.

EJECTMENT, which was submitted to SEAWELL, Judge, at Burke, on the Spring circuit of 1833, upon the following case agreed.

The land described in the declaration, was granted in the year 1796, to one *William Cathcart*. On the 19th of November, in the year 1814, the taxes being unpaid, it was sold by the Sheriff, and was struck off to the Governor, no person offering to pay the taxes for less than all the land covered by the grant. The Sheriff by deed, dated the 27th of July, conveyed the land to the Governor. This deed was, at July Term, 1815, of Burke County Court, in the words of an endorsement on it, "duly acknowledged in open Court by *A. A. McDowell*, late Sheriff, and recorded at full length, on the records of this Office," and was deposited and recorded in the office of the Secretary of State, on the 30th of November following. On the 16th of Nov. 1819, a grant for the same land issued to the lessor of the plaintiff. If the sale and deed of the Sheriff divested the title of *Cathcart*, then judgment was to be entered for the plaintiff; but if the title of *Cathcart* was still subsisting, then judgment was to be entered for the defendant.

His Honor, in giving judgment, after stating the facts above mentioned, proceeded as follows: "The act regu- "lating these sales passed in the year 1798, (*Rev.* "*ch.* 492,) and directs the sheriff making such sales, to "perfect the deed, by signing, acknowledging and de- "livering the same, in the presence of the next en- "suing County Court, and the clerk is required to "register the same in a book kept for that purpose, and

"to re-deliver it to the Sheriff, who is required before he "settles his account with the Comptroller, to deposit the "deed with the Secretary of State, who is required to re- "cord the same, and keep it for the benefit of the State. "The lands thus conveyed are declared to be vacant, "and subject to entry.

"The argument insisted on, is, that the deed is inval- "id, because the manual operation of signing, sealing "and delivering it did not take place in the presence "of the County Court; and moreover, because the ac- "knowledgment of the deed was not at the succeeding "court, after the sale by the Sheriff. It seems to me, "that the fair construction of the act is, that it was in- "tended to enforce the payment of the taxes, and to "provide a mode in which a record should be made of "the default of the owner, upon which the land should "be subject to re-entry, and that the time within which "the deed was to be executed, and the manner of exe- "cuting it, as provided by the act, are altogether direc- "tory to the Sheriff, and that the land became subject "to entry, and to be granted again, or that the forfeiture "to the State became perfect, as soon as the Sheriff had "sold them, made a deed to the Governor, and that "deed had been recorded in the Secretary's office. Un- "less this construction be adopted, the sale must be "void, unless it shall appear that every particular act "required of the Sheriff and Clerk, shall have been "done in the prescribed mode.

"One requisition is, that before the sheriff settles his "account with the Comptroller, the deed to the Gover- "nor shall be deposited in the Secretary's office. Another "is, that the clerk shall record it in a *book kept for that* "*purpose*. Another, that the Sheriff shall *call* on the "clerk for the deed. Another, that the clerk "shall deliver it to the Sheriff within twenty day after "the term of the Court. All which requisitions appear "to me, to be only directory to the Sheriff, and in "no respect to constitute any part of the title."

Judgment was accordingly entered for the plaintiff, and the defendant appealed.

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The case was argued at a former term by *Nash*, for the defendant, and by *Badger* for the plaintiff, and was held under advisement until the present term.

RUFFIN, Chief-Justice.—This case arises under the act of 1798, c. 492, and depends upon its sound construction. It recites that the mode of selling lands for taxes as then established by law, was insufficient to secure the collection of the revenue; and then provides amongst other things, that, when no person will pay the taxes for a less quantity than the whole tract, it shall be deemed a purchase of the whole by the Governor, and the Sheriff shall execute a conveyance to him, and his successors, for the use of the State; that it shall be the duty of the Sheriff to perfect the deed, by signing, acknowledging and delivery thereof in the presence of the next County Court; that the Clerk shall register it in a book, to be kept for that purpose, and after doing so shall certify the same, and deliver it to the Sheriff, (who shall call on him for the same,) within twenty days after the Court; that the Sheriff shall, before he settles his account with the Comptroller, deposit the deed with the Secretary of State, who shall record and keep it for the benefit of the State, and that the lands so conveyed shall be deemed vacant and subject again to entry. It then further provides, that the Secretary of State shall give to the Sheriff a certificate setting forth the quantity of land thus conveyed, (the tax being then *ad numerum* not *ad valorem*,) and that upon the deposit thereof with the Comptroller, and the oath of the Sheriff, that he had conveyed in conformity to the requisitions of the act, all the lands by him sold for taxes, and thus purchased for the use of the State, the Comptroller (the requisites of the act being complied with,) shall allow the Sheriff in his settlement, a credit for the tax on those lands and all charges on the sale, and his commissions thereon, as if the sum had been collected in money; and lastly that the Sheriff shall be credited in like manner in his settlement at home, for the county and poor taxes.

Such are the enactments of the Statute. On the part of the appellant, it is contended that the Sheriff's authority to sell lands for taxes, is a naked authority and that the validity of all acts done by him, and of the title derived under him, depends upon the strict and literal observance of all the provisions of this and other laws prescribing his duties, either as preparatory to a sale, or in completion of it by a conveyance; and particularly, that since this statute defines the time and mode of conveyance, one made in a different manner, and at a different time, is void. On the other hand, the counsel for the plaintiff insists that these provisions are merely directory to the officers, and although each officer may be liable for the omission of his own duty, at the suit of the party grieved, to the extent of the damage sustained, yet that the validity of the acts of one officer, cannot be impeached upon the default of another, nor the default of all affect the title of the land, whether purchased by the State, or an individual. Of this latter opinion, was his Honor, upon the trial, in reference to most of the provisions of the act, and particularly in reference to those which relate to the defects alleged to exist in the deed made by the Sheriff in this case. They are two: The one, that the deed was not signed, acknowledged and delivered in open court, but only acknowledged there. The other, that such acknowledgement was not at the next court after the sale.

We have considered the act attentively in its details, and in connection with the other statutes upon the same subject. We have also weighed the principles upon which the construction of this and similar statutes, insisted on by each side, are founded. In our opinion, each principle is correct to a certain extent, but in their application, neither is true, as an universal proposition.

It is true, that the Sheriff has but a power, and no estate, in the land, it is also generally true, that he who has only such a power, and must conform in its execution to the terms prescribed. The grant of the power was at the will of the grantor; and the formalities with which its faithful execution are to be guarded, are equally arbitrary. They must therefore be strictly observed. There is

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as little doubt that the will of the Legislature touching the mode of the performance of official duties or of the transfer of estates, is equally obligatory. But there may be and is a difference in the means of ascertaining that will.—While exact conformity is required to the provisions of instruments conferring a power between individuals, because the court can see no ground out of it, for any latitude of discretion, and because the instrument itself could be, and was necessarily looked to by one dealing for the estate, and a departure from its injunctions readily perceived; there are yet many instances in which forms and ceremonies, prescribed by the Legislature, are judicially regarded merely as forms and ceremonies, the omission of which shall not prejudice except in those cases which fall within the reason for prescribing them. An example is found in the law, requiring all bills of sales for slaves to be registered; yet, they are good between the parties without it, and are void only as to creditors and purchasers, for whose benefit the enactment was made. Nor has the omission of them been allowed to operate, when for the sake of executing a secondary intention of the Legislature as to the manner of performing an act within their primary intention, the principal act would be defeated. As in sales under execution without due advertisement, when the object is the satisfaction of the creditor with as little loss to the debtor as possible; which can only be attained by sustaining an honest purchase, at even an irregular sale.—Hence such sales have been supported; and also those of land, where there were goods, although the Statute only authorises the sale of land for the want of goods. It cannot be said that is the consequence of the form of the writ, and that to it only need the purchaser look. For although the *fieri facias* is as at common law, except that it runs on its face, against lands and tenements, as well as goods and chattels, yet the provisions of the statutes control its operation in particular cases to some and in others to all purposes, as if they were incorporated into the writ. Thus the writ does not specify the advertisement, order, place or mode of sale; yet the Sheriff

But the exact observance of form by an officer is not required, to give effect to his acts, when it will defeat the primary object of the Legislature.

As in execution sales, the object being to enhance the price, for the encouragement of bidders, they are not affected by irregularity in the prior acts of the Sheriff.

is certainly liable to the action of the party for mis-feasance or non-feasance in each particular. So, while the purchaser gets a good title, when the default of the Sheriff consists in violating some of the directions, he will gain nothing, if it consist in the violation of others. As if he buy from the Sheriff at private sale, which he could make at Common Law, but cannot, under our present law. *Ormond* v. *Faircloth*, (*Conf. Rep.* 550, 1 *Mur.* 36.) Also, if the Sheriff sell land or slaves at another place than the Court House, or after the last day of the week, on which by law, he ought to sell, a purchase is void. *Den on demise, of Mordecai* v. *Speight* (*Ante* 3 *vol.* 428.) Or, if the purchaser by active means procure the Sheriff to sell without advertisement, or to sell lands when there are chattels, he takes nothing. *Jones* v. *Fulgom*, (2 *Murph.* 364.) *Doe on dem. of Lanier* v. *Stone*, (1 *Hawks* 329.) In these cases, the authority of the writ is not deduced from, or confined to, its terms, but to those terms as controlled by the general regulations of the law. These regulations all are alike bound to take notice of. The Sheriff himself, when called on in any way, must be able to show his compliance with them. Third persons need not shew affirmatively the observance on the part of the Sheriff, of all legal pre-requisites to the sale, nor are they charged to take notice of all irregularities when shown on the opposite side, as in the advertisement, or adjournment of the sale, or that there were chattels which the Sheriff might have seized instead of the land. But where the violation of law is known to the purchaser, and he has procured it, or could not but know of it, as in the case of a private sale, he is no more protected in his purchase, than the Sheriff is in the sale. In these instances the purchaser breaks the law himself, or abets its breach by the officer, to the apparent prejudice of the parties to the execution or to the danger of their interests, and ought not to be upheld by the law.

It is otherwise when the irregularity is such as must be known to or is procured by the purchaser; as if he buy at private sale.

The first inference from the foregoing cases and reasoning is, that the provisions of a statute, which direct the performance of certain duties under certain circum-

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stances, are to be taken as merely directory, in favor of those who cannot generally know, whether the required circumstances exist or not, and have a right to expect that the officer of the law has in all things observed the law, and that he is sufficiently responsible for the consequence of his breach of duty. The next is, that as to the officer himself, and as to all those who procure the infraction of the law by him, or abet such infraction, when they must know it to be such, and so know, because the contrary cannot be, those directory provisions are strict laws and admit of no modification or departure. All such regulations are intended to protect the weak and distressed, and are guards against those in whose power they are, and cannot be dispensed with, except to avoid a greater mischief to the person whose protection is their object. But this can never apply in favor of those persons who are themselves the violators of the law, and yet seek to take benefit by the very act which is contrary to the law.

In this State, sales of land for taxes are *quasi* sales under process of execution, and are governed by rules analogous to those regulating sales under *fi. fas.*

The application of these rules are familiar to sales by execution. It has been insisted by the counsel for the appellant, that they must be confined to them, and cannot be extended to sales for taxes. Cases from the Courts of the United States and some of the sister States, were cited, which seemed rather to sustain the position. Doubtless that conclusion may properly follow from the framing of the particular statutes. The law may be so drawn up as to shew an intention in the Legislature, that each matter prescribed shall, under all circumstances, and as to all persons, be of the essence of the sale, which is to be the final result of all those proceedings. But in this State such sales have not been regarded in the light of *ex parte* proceedings, inflicting a forfeiture, or to produce one consequentially of the nature of inquest of office or outlawry, nor even as a naked private power, but as a method of raising, by a species of process, money due to the sovereign; and therefore, upon the same footing, as far as the like regulations were applicable, with the methods of levying debts at the suit of private persons. Thus in *Den ex dem. Martin* v. *Lacy*, (1 *Mur.*

311.) it was held, that the purchaser had a good title under a sale for taxes, although the Sheriff had not advertised for the time, or in the Gazettes prescribed. It may be mentioned here, that besides the general reasoning which induced the court to adopt that opinion, it finds some sanction in the phraseology of the act of 1792, which directs that lands sold for taxes should be advertised "as is required in cases of sales by executions," as to which the law was settled, that the purchaser was not bound to prove due advertisement. The point was again made in this court, in *Stanly* v. *Smith & Green*, (1 *Law Repos.* 511,) and ruled as before.

When the Sheriff has no authority to sell, or where his deed shows that he has exceeded his power, no title passes to the purchaser.

But on the other hand, when the Sheriff had no authority, or the purchaser's title deed shews that he has transcended his authority, and that therefore, it must have been known to the purchaser, the doctrine is settled that no title passes. Thus, in the same case of *Den* v. *Lacy*, it was admitted, that if no tax was due, or if it had been paid, the sale would be void. In *Jones* v. *Gibson*, (*N. C. T. R.* 41) a tract of land was sold for the taxes alleged to be due on the whole for three years, when the tax on an undivided third part had been paid. It was held for that reason that the sale was void, and also because the Sheriff cannot sell for a tax longer due than two years. In *Den on Dem. Douglass* v. *Short*, (*ante* 3 v. 432) it was again decided that a sale for the tax of two years, when only one was due, was ineffectual; because the whole thing is not sold, entitling the former owner to the surplus of the proceeds, as on a *fi. fa.* but only the least part for which any person will pay the tax due.—It is impossible to say for what quantity half the sum of money would have been given, as only one person might have had the whole sum demanded, while many could have raised that due. The owner, if the sale stood, would certainly be deprived unjustly of a part of his land, and as the court could not say how much nor which part the abuse of authority took from him, it was necessarily held void for the whole.

Applying the principles of these decisions to the provisions of the revenue laws generally, and to that under

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consideration, in particular, we think the present question may be decided on grounds entirely satisfactory.

The act of 1784, (*ch.* 1 *Iredell's Rev. p.* 475,) for ascertaining what property shall be deemed taxable, the method of assessing it and collecting the taxes, provides, (s. 14) that if any owner of land shall be unwilling to pay the taxes, he may surrender the land to the State, and that it may then be taken up by others. In 1793, (*new Rev. c.* 394) a method is pointed out for those who had attempted to make a surrender, to do it effectually; and as to all future cases, the act of '84 is repealed. By the act of 1787, (*c.* 269) and of 1801, (*c.* 3 *Martin's Rev.* 170) the justices, taking the list of taxables, are required to return their lists to the County Courts immediately following the taking of them, and the clerks to transmit copies to the Comptroller on or before the 1st of December following, and also the name of the Sheriff and his sureties; on which the Comptroller is to charge the Sheriff with each tax on his books and certify it to the Treasurer. The clerk is also to furnish the Sheriff with certified copies of the tax lists, on which, after the first day of the succeeding month, (now April) he is to proceed to collect, and is to account for and pay into the Treasury the whole amount of each species of tax on or before the 1st day of October ensuing; in default of which, the Sheriff shall forfeit his commissions, and the Treasurer shall immediately take judgment against him for the sum reported by the Comptroller, and also, by other acts, for certain penalties. Upon a settlement, if made, the Sheriff shall be allowed certain commissions, and, by other acts, his charges, and for insolvents under particular regulations. By the acts of 1792, (*c.* 376) and 1800 (c. 547) the Sheriff has the further time of one year, from the day prescribed by law for settling his public accounts, to finish the collection of taxes, and may do so by distress; but it is expressly provided, that this privilege shall in no respect alter or interfere with the law, directing the time and manner of his accounting with and paying the

Comptroller and Treasurer. These acts fix the time at which the Sheriff is chargeable, the sums to be debited to him, and the evidence on which the charge is made. By them he is bound to pay the gross revenue of his county on the first day of October, unless he discharges himself in some of the methods prescribed by law.

One of those methods is that now under consideration. It is unjust that the Sheriff should pay the tax, (then on land, according to quantity) if he had attempted to sell, but could not sell the subject taxed for the sum assessed on it. Previous acts had authorised him to distrain and sell lands for the taxes. That of 1792 makes land liable for all the taxes of the owner, & for want of personal property, directs a sale out and out, and the surplus money to be paid to the owner. That of 1794 provides, that so much of the land shall be sold as shall be necessary to pay the taxes and contingent charges; but it does not say when or how that part shall be laid off, identified or conveyed. The act of 1796 directs advertisement in certain Gazettes and that the land shall be offered in tenth parts, until the sum be raised. This act was still defective in not specifying the time and method of severance and of conveyance; and also in the important particular of not providing for the case, in which a sale could not be made for want of bidders.— Then comes the act of 1798, which contains the enactments before quoted, and besides them, these others:— That the Sheriff should set up the whole tract of land, liable for taxes, by way of *Dutch* auction, and strike off so much to the person who offered to take the smallest number of acres for the sums to be raised. That the purchaser may choose his quantity out of any part of the land, to be laid out in one compact body, as nearly square as may be, and adjoining some of the outer lines of the tract; and that he should within ninety days deliver to the Sheriff a plat made by the county surveyor from actual survey, with the courses and distances mentioned thereon; and the Sheriff is thereupon required to make him a deed.

The cases embraced in the act are therefore two:—

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a purchase by a private person; and one by the State, or by the Sheriff, for the State. The enquiry is, whether the times at which the sales are to be completed by conveyances, according to the letter of the act, are, in respect of the titles derived under such sales and conveyances, mere formal collateral incidents not material to the titles themselves, or are substantive component parts of the conveyances, and esential to their validity. We take it for granted, that the act of sale is not supposed by any body to vest the title till a conveyance.

The cases of *Den* v. *Lacy* (1 *Murph.* 311) & *Stanly* v. *Green* (1 *Law Rep.* 511) approved.

With regard to a sale to an individual, we think it quite clear, upon principle and authority, that the time is material. The purchaser is to procure the survey and plat and bring it to the Sheriff. These acts are his own, or he undertakes to have them performed. He must lose by his own negligence, and cannot say that a thing which the Legislature requires him to do, is unimportant in itself, and that it may be done at any period, as well as that which is prescribed. It will hardly be stated, after the cases of *Stanly* v. *Smith & Green*, and *Doe* v. *Short*, that if the Sheriff were to convey the whole tract to a purchaser, as having been bid off by him, that the deed would be good for any part; or if he were to convey an undivided share, without any survey, or a parcel polygonal in form and not contiguous to any of the outer boundaries. Why would the deed be bad?—because there is an excess of power beyond that delegated, and this cannot but be known at the time to the person claiming benefit by the act. So with respect to the time of the survey; the same party is laid under that restriction, and he must observe and submit to it. There is no instance in which the law allows a person who is to do a thing, or to do it at a particular time, to have himself the benefit of it, when omitted, as if it were done, or done in due time. But certainly not in a case where the delay is a prejudice to another, and the effect of the act, when completed, is to defeat a former estate. If the purchaser be not held down to the time, he will have an indefinite period. In the meanwhile, the former owner cannot know which part is his, for no elec-

tion is given to him, in default of the purchaser's election. The object of the act was, to have as little sold as possible, and therefore it gives the selection of the quantity bought to the purchaser, and it was also an object to afford the former owner an early opportunity to know his own, and therefore the purchaser's selection must be at a short day. Upon this act in itself, therefore, the materiality of the time is apparent, in respect of a private purchase. But if there could be a doubt on it, it is entirely removed by the act of 1809, (*Rev. c.* 760) which is in amendment of the former. It recites, that by the act of 1798, purchasers are required, within ninety days, (which is enlarged by subsequent acts,) to present to the Sheriff a plat made by the county surveyor or his deputy, from actual survey, and that the surveyor is not obliged by law to make the survey within the time, *by whose neglect or refusal the honest purchaser may lose his land*, although he has fairly paid the State for the same; and enacts that the surveyor shall survey upon request, under a penalty, and upon his refusal, gives the purchaser a further time of six months to procure a survey by any other person, on which the Sheriff shall convey.— Under this act of 1808, it could not be denied that if the purchaser did not, within the enlarged time, complete his title, it would be gone entirely. The act recites upon its face, that the time is essential, and that the purchase may be lost by the fault of the surveyor, and not that of the party alone, and if it were open before the judicial construction to the contrary, it is not now, after this legislative interpretation. Indeed, the very enlargement of the time is conclusive upon the necessity of observing strictly that before prescribed, for why do it by statute, if it were allowable by the courts? It cannot be said that the object was to make the restriction complete to the longer period allowed, for the act ties it down to that period, no more than the former act to the lesser term, except in the inference to be deduced from the declaratory provision, that under the former act, no title passed, unless upon a survey within ninety days. After the act of 1808, this sense put by the Legislature on the law

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of 1798 must be received by a court. We deem it clear therefore, that the purchaser must observe the time, as much as the former owner must, in his application for redemption.

The same train of reasoning leads to the conclusion, that it is equally essential to the title of the State. The prescription of certain periods in the same statute, within which those things are to be done which divests an estate, the things themselves being of the same nature would seem to render it certain, that if a fixed day be material in the one case, it is in the other.

But it is said, there is a difference, as the State is in no default. All the acts are to be performed by officers, whose omissions, therefore, ought not to prejudice the State. That as a purchaser, her title ought to be supported, and unless it be, that the revenue due to her, as sovereign, will be lost upon a construction of the very act, which declares its object to be, to secure its collection, for which end the previous laws were insufficient.

If the State could be regarded as a purchaser, the court could not sustain the purchase, if by the structure of her own laws she had made its validity to depend upon an act which has not been performed. That may well be, notwithstanding she is herself the purchaser. It is not to be presumed that she intends injustice to her citizens, and she may rather relinquish the present tax, than exact future taxes on the same land, from the owner, and then defeat his title by taking a deed under a former sale. For the owner is liable in his personal estate and other lands, for the taxes on each tract, by other statutes, and until a conveyance, the title of the land sold remains in him, and he may be assessed for it. In the case of a sale to an individual, he is made liable it is true, to the accruing taxes, but this must mean after he has completed his title, because the provision for redemption is, that the former owner shall repay the sum paid on the purchase, with twenty-five per cent thereon, without including intermediate taxes. But the act is silent about accruing taxes when the State buys, and so it must have been intended, because one tax is always

assessed on land before it can be actually sold for the preceding assessment, and the public is under no obligation to give up either.

But to us, it seems that the State cannot be deemed a purchaser, whose title is to be protected, notwithstanding irregularities, within any of the principles on which they are disregarded in sales on executions. The scope of the act is not to enable the State to re-acquire her territory from her own citizens. She does not wish it. As soon as she gets it under this act, it is by the same act offered for private appropriation again, upon the same terms on which it was before granted. The policy of the State, in this statute and throughout our legislation, is to part on the most favorable terms with all her public domain, with a few exceptions, and not to become again the proprietor of any that has been granted, unless in a case of necessity. This is clear from the act of 1793, which forbids the surrender of land to avoid the taxes. It is apparent on the act of 1798 itself, for she does not purchase, as a chapman does, for the least price, but only takes the land instead of the tax, when the tax can be got in no other way, and if she does not take the title, the Sheriff is responsible for that tax, and the owner for the accruing ones. The great object of this provision, therefore, is not to acquire the land for the State, but to *secure* the *collection* of the taxes, to raise revenue, and have it duly accounted for and paid by the proper officers, and in justice to those officers, to make them account, for and pay only such portions as they have collected, or might have collected.

As has been already mentioned, the Sheriff is charged with all the taxes upon the clerk's return, and they are to be paid by him, whether collected or not, on the first of October in each year. If they have been received either from the person assessed, or by the sale of his property, the Sheriff accounts only for what has come to his hands. Before the act of 1798, there was no provision to meet the case, where no sale could be made, nor for the case of a sale at a less price than the whole tax. These omis-

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sions exposed the Treasury to the danger of deficiency, and also of fraud. The Sheriff might make sales for a small part of the tax, or he might really be unable to collect it by a sale. In the latter case he ought to be excused from paying. No act of the Assembly is found which authorised any relief to him, at the public offices upon his return of that fact, or otherwise. But if he did not get it then, the Legislature itself would certainly extend it by a special act, for which probably, there were many applications. To avoid these inconveniences to the public, and especially to give a certain and adequate relief to the Sheriffs upon an uniform rule, which would protect them from exactions at the Treasury for monies, which they had not, and could not receive, and at the same time enforce them both to diligence in collecting, and punctuality in paying the revenue, were the causes of the act of 1798. The case within the purview of the act, is a sale and conveyance completed before the tax for which the sale is made is due, and paid at the Treasury. The office of Sheriff is annual, and his accounts and settlements for each year, distinct and independent. Hence the settlement in which he is to have credit for the land sold, is that which includes that very tax. The act assures to him such credit, upon certain conditions which it puts in his power to perform, and the performance of which it requires to be established by certain evidence. The case then is not one in which the interest of the creditor, or the debtor requires the law to be indulgent in overlooking omissions in the mode of proceeding. It is one in which the creditor is secure at all events, because she can look to the Sheriff and his sureties for the tax, but in which she will not, provided he makes it appear in the manner prescribed, which is plain and easily attainable, that she ought not. This part of the act, is therefore substantially and really for the benefit of the Sheriff himself, the person charged with the duty of selling, and with the performance of all the subsequent measures of importance required for its completion. Upon established principles he ought to be held to strict performance. He is so held in this

statute. It requires him to produce and file the deed in the office of the Secretary of State before he settles for the taxes, and to make oath that he *has conveyed* all the lands struck off to the State, *in conformity to the requisitions of the act*. The deed must therefore have been made, recorded and filed, before the first day of October of the year in which the tax is payable. This would of itself, be fatal to the plaintiff's title, since the sale was for the tax of 1813, due 1st October, 1814, and was not made till the 19th of November following. But it is not adduced now with a view to that position, but to those on which the decision was made in the Superior Court. If the sale must be before the day of payment, and one afterwards is void, it necessarily follows that every other act, essential to the use of the sale and deed upon that day of payment, must also precede it. That such subsequent sale is void, is deduced from these premises. The act no where engages the State to refund the taxes already paid into the Treasury, if at a subsequent day, the land cannot be sold to a private person, nor does it authorise the Treasurer or Comptroller to allow a credit, except in the settlement for the tax when due. After receiving the tax from the Sheriff, it cannot be supposed that the State would keep it, and also take the land. She does not agree to purchase but for a tax due her at the sale. For the benefit of the Sheriff she does that, but the act holds out no idea to him, that after he has accounted with her, he may yet impose the land on her, and reclaim the money. There is no power in the officers of State, to allow such a credit, or to make the land a part of the public domain, but in one event, which has not occurred here. It must be taken here that the State has received the tax, and therefore ought not to take the land. At the Treasury the Sheriff could not be reimbursed, unless by a special act, the validity of which arises not from the previous legal provision and obligations on the State, but upon the will of the Legislature, who can dispose of the revenue at pleasure. Nor is it to be supposed that such a case would meet with Legislative favor, because it would encourage negligence and delays in

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collecting the taxes. But if it would, it has not been expressed in any public law.

The question has thus far been considered in reference to the words of this part of the Statute, and to the circumstance that the interest of the Sheriff himself, was principally concerned, and therefore that he should act in due time. Whatever interest the State has, demands likewise his diligence throughout. It is important to her to know her actual nett revenue, and what prior claims there are against her at the time it is paid in.—She wishes to re-sell the land, that she has reluctantly taken back, and with as little delay as possible. An early and public notice of it in the county where it is situated, is therefore deemed important. She wishes to avoid and detect frauds attempted on her, and therefore while the whole matter is of recent occurrence, she requires that a sale made, shall be acknowledged of record and in open court of that county, that no pretended sale may at a distant day be imposed on her, and she brought in conflict with one of her own citizens. Every act of omission which tends to defeat these views, is inconsistent with the real intention of the Legislature, and cannot be tolerated. The State does not take the land but as a credit to the Sheriff for the tax, and no conveyance to the State is to be taken as valid within the Statute, but such an one, on the production of which, the Sheriff would be entitled to credit for the tax. From this it would result, that the Sheriff must procure the other officers to do their duty, because otherwise the State is not bound to accept the deed, and the title does not vest in her, under this law, in any other case. The injury to the Sheriff is not one which defeats an estate, but is merely pecuniary, for which his redress would be plain against the officer. But it is not necessary to decide on the effect of the omissions of others. The case is not brought to that, but arises on the omission of the Sheriff himself, of an act exclusively in his own power, which the law makes essential to his own discharge, without which discharge, the State neither wishes, nor will take the land.

It may be said that the State has accepted this deed by her officers, and by other officers, has re-granted the land, amongst others, to the lessor of the plaintiff, which shews that she claims the benefit as a purchaser. It is notorious that grants are always issued upon the suggestion of the grantee, that the land is vacant. The State does not warrant that, nor is it a fraud in her to grant land already appropriated On the contrary, it is declared to be a fraud in her to obtain a grant for such land; for which the entry laws declare the grant void, and for which it may be revoked and cancelled, upon *scire facias*, at her suit. Besides this, the sovereign is never estopped, because she must necessarily act through agents with instructions and authority prescribed by law, and therefore may always show the truth.

To this conclusion we have formed, no objection occurs to us as plausible, unless it be, that under the statutes mentioned, the Sheriff has an additional year to make collections, and may do so by distress. The answer is,that the two statutes are to be construed together, and so as to make them consistent with each other if they can be. If consistent, one does not repeal the other. They appear to us to stand together, each in full force. The Sheriff may sell to reimburse himself, during the next year. But the State does not consent that he may use the name of the Governor as a bidder upon that occasion. If he delays to sell until he pays the taxes, he must find bidders. His delay is at that risk. The sale is then made for his benefit exclusively, both in form and fact, and not for that of the State; and therefore she will have nothing to do with it.

The authority to make the State a bidder is a special one, and for the Sheriff's benefit, to bid for her only where there is no other bidder, for a tax due to her, and to make a deed within a certain time, upon which the Sheriff shall have credit. It must therefore be strictly construed with respect to those acts, and the periods prescribed. The Sheriff, for instance, could not strike off less than the whole to the State; if he did, it would

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be void, being beyond his restricted power. There is the same limitation on his power to vest the title in the State after the period for making the deed has elapsed. Upon these grounds, it is the opinion of the court, that the deed to the Governor is void, because it was not made or acknowledged at the court next succeeding the sale. The duty of making it was the Sheriff's; the exoneration and advantage to be derived from it, in the contemplation of the law, was his, and the consequence of the neglect must fall, and has fallen on him.

We should very reluctantly hold, that "a due acknowledgment in open court," was not a signing, acknowledgment and delivery in court of a deed dated at that time, unattested, and not requiring any other attestation but the certificate of the clerk to those facts. The recognition of the signature then, would seem to be a signing then. But the court has not examined this point very much, and therefore does not positively decide it; deeming it safest, however, in all such cases, that ministerial officers should comply with the law to the letter, especially where they are themselves to take benefit by their own acts.

The judgment of the Superior Court is reversed, and judgment upon the case agreed rendered in this court for the appellant, the original defendant.

Per Curiam.—Judgment reversed.

THOMAS J. ARMSTRONG, CHAIRMAN, &c.

v.

DANIEL DALTON, *Ex'r. of* ISAAC DALTON.

Although no *laches* are imputed to the State, and as to it, the rule is *nullum tempus occurrit*, &c. yet, this is not the case as to those bodies to whom the execution of public trusts are confided. And where the County Court brought an action of *Assumpsit*, against a Treasurer of public buildings, *it was held*, that the act of limitations was a bar.

This was an action of ASSUMPSIT, commenced the 2d of April, 1833, by the plaintiff, as chairman of Stokes County Court, (he being enabled to bring it by a private act of Assembly passed in 1825,) against the defendant, the executor of *David Dalton*, for money paid to the testator as Treasurer of Public Buildings, and not accounted for.

PLEAS—1st. *Non Assumpsit*. 2d. Statute of Limitations.

On the trial on the last circuit, the plaintiff offered the deposition of one *Archibald Campbell*, taken under a commission signed by the clerk of the Superior Court of Stokes, under the seal of that court, but which recited that the court in which the action was pending, was "the Superior Court of Law and Equity for the County of Stokes." The defendant objected to the deposition, and assigned as a reason why it should be excluded, that the action was pending in the Superior Court of Law for the county of Stokes; there being in fact, no such court as that described in the commission. But his Honor Judge NORWOOD overruled the objection, and the deposition was read. The defendant offered evidence which tended to prove that more than three years had elapsed since his testator made a payment on account of the fund in his hands, and he relied upon the Statute of Limitations.

His Honor charged the jury that the Statute of Limitation did not bar the State, and inasmuch as the Legislature had delegated to the County Courts, for the more convenient administration of justice, a portion of

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the sovereign power, it did not bar their action, the money claimed being the property of the public.

A verdict was returned for the plaintiff, and the defendant appealed.

W. A. Graham, for the defendant.

Nash, contra.

DANIEL, Judge.—After stating the case proceeded: In England, a general rule has been laid down, and established, that when an act of Parliament is made for the public good, the advancement of justice, and to prevent injury and wrong, the King shall be bound by such act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title, or interest, is divested or taken from the King, in such case the King shall not be bound unless the statute is made by express words to extend to him. *Bac. Ab.* (*Prerogative E. 5 page* 559.) From the presumption that the King is daily employed in the weighty and public affairs of government, it has become an established rule of common law, that no *laches* shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent. "*Vigilantibus sed non dormientibus jura subveniunt*" is a rule for the subject, but *nullum tempus occurrit regi*, is the King's plea. For there is no reason that he should suffer by the negligence of his officers, or by their contracts or combinations with the adverse party. (5 *Ba. Ab.* 562, *Hob.* 347.) Therefore, the King is not bound by any Statute of Limitations, unless it is made by express words to extend to him. (5 *Ba. Ab.* 461. *Plo.* 244.)—But the rule of *nullum tempus occurrit regi*, is subject to various exceptions, both at common law and by statute, which may be seen in *Mr. Hargrave's note*, to 1 *Thomas' Coke Lit.* 74, (n. 16.) It seems that the rule *nullum tempus &c.* is applicable to the States where not restrained by some constitutional provision, legislative enactment, or principle of [the common law. (*Kemp* v. *The Commonwealth*, 1. *H.* & *M.* 85.) It is said by the Supreme

Court of the United States, that it is a well settled principle, that the Statute of Limitations does not run against a State. (*Lindsey* v. *Miller* 6 *Peter*.666.) But does not the rule extend to actions brought by a county, or in the name of any officer or person for the benefit of a county? A county is *quasi* a corporation. It has certain rights and privileges, and can by its agents and officers execute certain given power. Judge *Kent* (*Com. ps.* 121, 122,) says, besides the proper agregate corporations, the inhabitants of any district, as counties, or towns, incorporated by statute with particular powers, are sometimes *quasi* corporations. Public corporations as distinguished from private corporations are such as exist for public political purposes only, such as counties, cities, towns, and villages. They are founded by the government for public purposes, and the whole interest in them, belongs to the public, viz: to the county, towns, &c. But the reason which upholds the rule of *nullum tempus &c.* when applied to the sovereign, does not, in our opinion, excuse the *laches* of the officers of these small communities. The plea of *nullum tempus, &c.* is, as before mentioned, one that peculiarly belongs to the soverign, or to the Commonwealth to be exercised for the public good. The system of accountability and discharge as between the sovereign and his subjects or between the State and its citizens, is regulated by peculiar provisions, and guarded by numerous checks, under the direction of great public officers, so as to render it easy to ascertain even at remote periods of time, the rights as well as the obligations of those against whom claims are preferred. But the contracts between these small communities, and individual citizens are liable to all the uncertainties with respect both to charge and discharge, and to all the defects of proof, concerning them, which time ordinarily produces in the investigation of human transactions. The King or the State cannot be presumed to mean wrong, or to have an interest inconsistent with justice.

But these communities, like the individuals who compose them, have no such legal presumption in their fa-

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vour. No authority is shown to support the position that they are not like other corporations or private persons subject to the operation of the Statutes of Limitation, nor can we see any reason which can bring them within the exception which is admitted to apply to the sovereign and the State. The act of 1715, *Rev. c.* 2, § 5, declares that *all actions* therein enumerated shall be commenced or brought within the time and limitation in the act expressed, and not after. The rights delegated to the counties by the State, do not in our opinion exempt the remedies by action of the counties, from the operation of the act of limitations. We mean remedies for rights or things, which rights or things have been claimed or held adverse to the county.

A commission directing the taking of a deposition to be read on the trial of a suit pending in the Superior Court of Law and Equity, &c. is valid.

As to the exception taken to the reading of the deposition of *Campbell*, we think the commission sufficient to authorise the taking of the deposition. In the sentence "Superior Court of Law and Equity," the word "*Equity*" is considered as surplusage. The commission is signed by *Thomas S. Armstrong*, the clerk of the Superior Court of Law for Stokes county. The commission is likewise under the seal of the Superior Court of Law; it is sufficiently certain, and properly authenticated. We are of opinion, that a new trial must be granted, because of a misdirection on the plea of the Statute of Limitations.

PER CURIAM.—JUDGMENT REVERSED.

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EDMUND AND MARTHA DUNSTON,

v.

BENJAMIN HARDY.

A person, not the guardian of infants, who takes upon himself to hire out their slaves, making the bonds payable to himself, is a *wrong-doer*, and may be rendered liable for a conversion. And the proper measure of damages, is the amount of the hiring, with interest from the expiration of the credit.

The doctrine of conversion stated by RUFFIN, J.

This was an action of TROVER, for the conversion of slaves, tried before his Honor, Judge MANGUM, at Bertie on the Spring Circuit of 1830, when the following facts were in proof.

In the year 1818, one *Edmund Fleetwood*, was the guardian of the plaintiffs and in their right had possession of the slaves in question. He died in December 1818, having duly appointed *Benjamin Hardy*, his executor. On the first day of January, 1819, the plaintiffs having no guardian, *Benjamin Hardy*, as the executor of the former guardian, and with the full knowledge that the slaves belonged to the plaintiffs, hired them out for one year, and took the notes for the hires, payable to himself. The obligors in the notes, and their sureties were deemed good at the time of the hiring, but before the expiration of the credit, (twelve months) the obligors and the sureties failed, and *Hardy* did not collect the hire. The slaves were not demanded of *Hardy*, during the year 1819, and after the hiring had expired, to wit, the 1st of January, 1820, they came to the possession of the present guardian.

The plaintiffs, by their guardian, brought this suit some time in the year 1824, and alleged the act of hiring for one year to be a conversion, and claimed damages for the value of the hire for one year, and interest to the day of the rendition of the judgment. The jury under the instructions of his Honor, rendered a verdict for the plaintiffs, for the actual amount of the hires, bargained for by *Hardy*, and interest on that amount, from

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the 1st of January, 1820, the day, on which it fell due, to the time of the trial. A new trial was moved for on account of misdirection, and refused, and a judgment entered upon the verdict; from which the defendant appealed.

Gaston, for the defendant.

Hogg, for the plaintiffs.

RUFFIN, Judge.—I think this action is maintainable, and that the Court below did right throughout.—It may be a hard action; but the question is, can the plaintiffs bring it? I think, they can; for here is an actual conversion. The defendant took the plaintiffs' property, knowing whose it was, and disposed of it for value for one year. It is no answer, that this was intended for the owner's benefit. The finder of a chattel, the property of one unknown, may justify taking it, and reasonably using it. For until the owner appear, it belongs to the finder. But if the latter consume it, or sell it, he must pay the owner; for that is an actual conversion, and the intent makes no difference. So when one sees another's property in jeopardy, he may take it into his care, and preserve it; but he cannot make a disposition of it, but at the risk of the owner's action. So, if one design a benefit to the owner, and the property happens, by accident, to be destroyed in the very act of using it to promote that benefit to the owner, the party is excused. The case of the boat, put at the bar, (*Drake* v. *Shorter*, 4 *Esp. Rep.* 166,) is an instance of this sort. Another might be, where one took the horse of another, to ride for a physician for the owner, and he was injured without negligence. Many others could be put. But they are altogether different from the exercise of that dominion, which implies a right to sell or dispose of the property. Although the taking be not wrongful, the use, in that way is. It is an actual conversion. No person can assume an agency of that sort for another, and especially for infants. He, who intermeddles with their property, must make sure

of his authority. The utmost dealing with infant's property that can be countenanced, is, to hold it for preservation until the next court at which a guardian could be appointed. It is said, the defendant did not choose to be guardian; but that he voluntarily did the appropriate acts of one, for the benefit of the infants; and therefore ought not to be charged. But the intent cannot alter the fact. Here, I repeat, is an actual conversion. All beyond preservation is a tortious charity. But if it were put upon the question of intent, the case is equally conclusive against the defendant; for he took the bonds payable to himself, so as to make himself, and not the hirers, debtor to the infants. There are however, many instances, in which the law will not tolerate acts of officiousness, flowing from the most benevolent motives. Suppose the infants here, had died, instead of their guardian. There can be no doubt, that one may safely, and often ought, to collect the effects of a deceased person, for safe keeping. The law supports such an act. But he must not keep them too long; nor must he, in any event, sell them, however perishable they may be, and though the sale be absolutely necessary to prevent their destruction or waste. If he does, he becomes a *wrongful* executor. Why? Because it is too dangerous to let men, upon any pretence, intermeddle with other people's property, in a way looking like ownership in themselves. And in such case, it is clear, that a subsequent administrator might bring trover, either against the seller or the buyer. Such a transaction is indeed capable of confirmation. But here the plaintiffs were infants and could not assent, and their guardian refused the bonds. They have elected to consider the defendant, not constructively their agent, but according to his apparent and direct character, a wrongdoer. I see nothing to prevent them. As to the damages and interest, they were properly left to the jury, with directions to make the value of the property, the measure. Trover is not a vindictive action in which the character of the party, or the feelings of the jury, constitute the standard of damages. It is to re-

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cover for an injury to property; and the question is not the gain of the defendant, but the loss of the plaintiff.

PER CURIAM.—JUDGMENT AFFIRMED.*

*This case was decided several terms ago, but the papers having been misplaced in the confusion occasioned by the fire, which consumed the Capitol in 1831, it could not be reported sooner.

Den ex dem. CHARLES H. BALLARD,

v.

TULLY CARR.

Where a cause was removed, and the record certified on the removal was erroneously copied, upon advantage being taken of that error in the Supreme Court, the remedy is to move to stay proceedings, until the record of the Court where the trial was had is corrected, and then to bring up that record by *certiorari*.

Iredell, for the defendant upon an affidavit setting forth that this cause had been removed from Gates to Hertford by an order which was entered on the record of the cause, while pending in that court, but which had not been transcribed into the copy certified to Hertford; and that the plaintiff, who was the appellant, had assigned that omission as error, moved for a *certiorari* to Gates, in order to found a motion for an amendment in this court, upon the transcript returned to that writ.

No Counsel appeared for the plaintiff.

RUFFIN, Chief-Justice.—This cause was tried in Hertford, to which it had been removed from Gates, and has now come into this Court by appeal.

There is a defect in the transcript sent here, in not setting out an order, made in the cause, while it was in Gates Court, which may be to the prejudice of the appellee, and it is admitted that the same defect exists in the transcript filed in Hertford, from which that in this

Court has been correctly made. The appellee now moves on affidavit, for a *certiorari* to the Clerk of Gates Superior Court, to obtain a true transcript from that Court, setting out the omitted order, so that the record here may be amended by it.

Not doubting that this Court has the power of making the amendment here, and ought to do it from the record in Gates, rather than there should be a failure of justice, yet it might be a question, whether it should be by *certiorari* to that Court for a copy to amend by, and ought not to be from the original, which would be troublesome and expensive to the parties. The amendment may be more conveniently made in the transcript in Hertford, from the originals carried into that Court by the Clerk of Gates, and as the judgment we are here reviewing is that of the Court of Hertford, there is a manifest propriety, that the records in that court and in this, should be consistent. As the more convenient practice therefore, the court adopts it as a rule, to stay proceeding upon the appeal here, until the party can have the amendment made in Hertford, and bring up a new transcript from that court upon *certiorari*, rather than pursue the course requested by the appellee. The motion for the *certiorari*, at present, is therefore refused; but the court will not give judgment in the appeal at this term, but will give the appellee an opportunity of bringing in a transcript of the record as amended.—Besides the greater convenience of this course, as it appears to us, it is sanctioned by the course in England, upon writs of error brought in the Exchequer Chamber, which proceeds upon a transcript only from the King's Bench, in which the original record remains, and in that respect, differs from the case of a writ of error from the King's Bench, to the Common Pleas. (*Tidd's Practice.* 771.

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John Leigh v. Hezekiah Lockwood, *Administrator.*

Upon *plene administravit*, the defendant is allowed the costs of an action brought against him in his own right, for a conversion of chattels, which he *bona fide* thought were of the assets of the decedent.

This was an action of DEBT, brought against the defendant as the administrator of one *Wilburn*. The only question arose upon the plea of *plene administravit*.

On the trial before MARTIN Judge, at Pasquotank, on the last circuit, the defendant offered to prove in support of his plea, the costs incurred in defending an action of trover, brought against him for a quantity of corn, in which a verd ict had passed against him. That this was in the possession of his intestate at his death—was by him, the defendant, under the advice of counsel, sold as a part of the assets—and that the action was defended *bona fide*. But the suit being against the defendant in his own right, his Honor rejected the evidence, and a verdict being returned for the plaintiff, the defendant appealed.

Kinney, for the defendant.

Iredell, contra.

RUFFIN, Chief-Justice.—It is somewhat surprising, that the researches of the bar and of the court, have been ineffectual for a case in point, upon the question in this cause. It may perhaps be accounted for from the circumstance, that in England almost all administrations are settled either in the spiritual courts, or upon a creditor's bill in chancery. If the creditor uses such accounts at law upon an issue on *plene administravit*, he must take them as they are, and cannot charge the executor thereby, without also discharging him. In those courts the executor is regarded as a trustee, and if he conducts himself fairly, is entitled to his costs in the suits there, and also all those incurred *bona fide* in other courts, in the course of administration, as just allowances to him in the execution of the trust, by which as he cannot be gainer, he shall not be made loser. This is the general doctrine. (*William's Exor's.* 1252-3.) It is clear that all

such charges, properly incurred, are good against the estate, as against the legatees and next of kin, who are more strictly *cestuis que trust*, than creditors of the executor. But if the costs have been unnecessarily incurred, as if the executor suffer himself to be sued for a debt, when he has assets to pay it, or sue for a demand which he knows, or had the means of knowing, never existed, or had been satisfied, he is not only bound, where the law subjects him to the costs, to pay them as between himself and the party to the suit in which they arose, but must pay them out of his own pocket, as against the estate. In general the common law does not give costs against an executor, but upon the idea that he is personally in default, and ought to pay them at all events *de bonis propriis*, if he has not assets under his own control with which to defray them. If he has assets he is considered, in respect of them, the debtor. Yet that is not the principle which governs the settlement between him and those to whom he is accountable in equity. There the estate is considered, in the first instance, the debtor, and the executor only when he acts wrongfully. Hence although at law, costs are not given to a defendant in a suit in which an executor is plaintiff, and the cause of action arose in the testator's time, although the plaintiff fail, yet the executor is entitled to charge his own costs against the estate, as against the legatee, and for that reason the latter is not a competent witness for the executor, by releasing his interest in that debt, without releasing his interest in the whole *residuum*. (*Baker* v. *Tyrwhitt*, 4 *Camp.* 27.)

The idea on which his Honor went, and which has weighed much with this court, is that the suit in which the costs were incurred, was for a trover of the defendant's own, and that it was a personal wrong, in which the intestate's estate was not concerned. It is in strictness so at law, and conclusively so as between the parties in that action. It is presumptively so in every other court, and as between all parties, until the executor makes it appear that his defence was upon his right in his representative capacity, for the benefit of the estate, and upon a fair case. The question is, whether those

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facts can be acted on at law, upon the plea of *plene administravit.* to the suit of a creditor. We see an inconvenience in it, as for the want of a competent Ordinary to adjust the charges, the trials before a jury may be much perplexed by such questions, and our statutes only give authority to the County Courts to fix the commissions, and not settle the account so as to shew the balance. But we see a greater inconvenience—positive injustice to the executor, in rejecting them altogether.—We assume here that the defendant could have proved what he offered to prove, that the corn was in possession of the intestate at his death—that he supposed he owned it, and that he sold and delivered it as administrator—that he had good reason for his belief, and proceeded under advice of counsel. This is a case of perfect *bona fides,* which Lord *Ellenborough* said, in *Baker* v. *Tyrwhitt,* was the ground of the liability of the residuary legatee to the executor, when plaintiff for his own costs. We think this defendant would have a right to charge his costs in that action to the estate as against the legatees. Why should he not against a creditor ? In our law, an executor as well as administrator, is a representative in trust, and not for his own benefit. Although at law he is not regarded so in every case, yet he is in respect of the administration of the assets. The acts of 1789 and 1799 authorize all necessary charges and disbursements, and provide that they, and the commissions allowed, shall be deemed proper charges against the assets, and may be retained as well against any creditor of the deceased, as against a person claiming as legatee, or as being entitled to a distributive share. To us it seems that whatever claims the executor has against the estate, he may, by these statutes, assert as against any person who is prosecuting him for a demand on, or for the estate, and in the court in which he is thus prosecuted. His right, as in other cases, will depend upon the disbursement being necessary and proper. We know that executors are constantly allowed upon a question of fully administered their own costs in actions brought by them as exe-

cutors, and in which they failed. The failure establishes that the demand was no part of the testator's estate, and therefore that the executor went beyond his duty in suing for it. In England certainly, he can claim such costs from the legatees. In our law he always claims and retains them as against creditors.—The cases seem to us analogous, and indeed to be the same in principle: which is that the executor acted honestly on the occasion, and upon his trust. The only difference is, that if the testator left evidence of a debt, it raises a presumption that the executor believed the debt due, and that it was a part of the estate, and the form of the action shows that he acted only for the benefit of the estate. That presumption the legatees may repel. In the present case the record raised a contrary presumption, that the wrong was the defendant's own, and upon his own title, or claim of title. We think he may repel that presumption, especially as it has been held that the plaintiff in the former action might have declared against him in his representative capacity. (*Mobley* v. *Runnells*, *ante* 3 *vol. p.*303.) His right to re-imburse himself the costs, cannot depend on the caprice of the plaintiff in that action as to its form. Upon the whole, it is the opinion of the court that the evidence ought to have been received, and that the judgment might be reversed, and the cause remanded for a *venire de novo*.

PER CURIAM.—JUDGMENT REVERSED.

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SAMUEL KING, *Chairman, &c.* v. BENJAMIN HOWARD.

Executors, when they are defendants, have generally no privilege as to costs, and are subjected to them, unless some plea to the whole action be found in their favor. And where upon *plene administravit*, the defendant was fixed with assets, as to part of the plaintiff's demand, the latter recovers his costs.

This was a *Scire Facias* against the defendant to have execution *de bonis propriis*, for the costs of a former action of debt brought against the defendant as the executor of *John Howard*.

The *sci. fa.* set out an absolute judgment in favor of the plaintiff for $47 07½, the amount of assets in the hands of the defendant, and also for $49,55 the plaintiff's costs, and judgment *quando* for a large sum. An execution *de bonis testatoris* was recited with a return of satisfaction, of the assets found to be in the hands of the defendant, and *nulla bona* as to the costs. No *devastavit* was suggested in the *sci. fa.*

PLEA—*Nul tiel Record.*

From a copy of the record of the former suit, which was filed with the transcript, it appeared that the action was debt on a bond with a condition. The pleas were Performance—*Plene administravit*—Former judgments and no assets *ultra*. On these pleas a verdict was returned for the plaintiff, and on that of *plene administravit*, the finding was, "that the defendant hath not fully administered, and hath assets in his hands to the amount of $47 07½. Whereupon judgment was rendered as recited in the *sci. fa.*

His honor Judge NORWOOD, at Lincoln on the last Fall circuit, dismissed the *sci. fa.* and the plaintiff appealed.

Pearson, for the plaintiff.

No counsel appeared for the defendant.

RUFFIN, Chief-Justice.—After stating the case as above, proceeded.—The proceedings throughout have been irregularly conducted, and the entries inaccurate, and the case is brought here in a form which is far from presenting the points distinctly. No case is

stated in the record, on which the opinion of the court was given. But to the transcript of the present suit is annexed a transcript of the former one, which we cannot suppose was meant to enable this court to pass on the issue on *nul tiel record*, but was intended to form the case on which the point actually decided. arises.— That point as we understand it, is whether in the former suit the plaintiff was entitled to judgment for costs, *de bonis propriis* of the executor. With reference to that we have looked into that record, and we are of opinion that he was.

To that action the pleas were, conditions performed, fully administered, former judgments, and no assets *ultra*. No particular sum is mentioned in the last plea, as confessed in this action. The assets admitted must consequently be understood to be such only as were charged with the judgments previously rendered, and mentioned in the plea. If the plea had specified the sum, and the plaintiff had taken issue on it, that the defendant had assets to a larger amount, and that had been found for the defendant, he would have been entitled to judgment for costs against the plaintiff; for at common law, there could not have been a judgment *quando* for the residue of the debt, since the plea went to bar the action for the whole residue, and had been found for the defendant. (*Hogg* v. *Graham*, 4 *Taunt.* 135.) *Marshall* v. *Wilders*, 17 *Eng. C. L. Rep.* 467. This has been adopted as the rule here, it being held that the right to costs is not altered by our practice, introduced under statutes, of rendering judgments *quando*, where the issue upon a general or special *plene administravit* is found for the defendant. (*Battle* v. *Rorke*, *ante* 1 *vol. p.* 228.) In the case before us however, all the issues were found for the plaintiff, and upon both the general and special *plene administravit* the verdict is, that the defendant had assets to the value of $47 07½ over and above the judgments with which he would have satisfied so much of the plaintiff's demand. The question is, whether in such a case the executor is liable for the costs at all events.

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This has been so often decided, that it can hardly be called a question at this day. Executors, when defendants, have generally no privilege as to costs, but may make themselves liable to them, even when there are no assets, and when the plea was not untrue to their own knowledge, unless some one of the pleas which goes to the whole cause of action, be found in their favor. If he plead *plene administravit*, in whatever form pleaded, and it be found in any part false, or if it be, as pleaded, confessed by the plaintiff, and issue be joined on any other plea or pleas, on which the verdict is generally against the defendant, the judgment is in *presenti* or *quando*, as the case may be, for the debt to be levied *de bonis testatoris*, and for the costs, presently to be levied *de bonis testatoris et si non, de bonis propriis*. So it is laid down (1 *Saund.* 336, *note* 10,) by Sergeant *Williams*, whose writings have, after a scrutiny of many years, been found so accurate as to be now deemed of the text of the common law, especially upon the heads of pleadings and entries. The adjudications in our own courts have been repeatedly accordant. (*Parker* v. *Stephens*, 1 *Hay.* 218. *Hogg* v. *White*, *ib.* 298. *Teasdale* v. *Branton*, 2 *Hay.* 377.) It is only when the executor succeeds on an issue on some one plea which goes to the whole cause of action, that he is entitled, to costs, and in such case he is entitled, although he may have failed upon other pleas put in by him. (*Cockson* v. *Drinkwater*, *Dougl.* 239. *Hindsley* v. *Russell*, 12 *East.* 232. *Hogg* v. *Graham*, 4 *Taunt.* 135.) And as to the verdict on an issue on the particular plea of *plene administravit*, either generally or *præter*, it is, upon the same principle, only when found altogether for the defendant, (that is, either that he has no assetsor none beyond the sum confessed, so that the judgment would be in England, that he go without day, and here, *quando* for the whole sum in dispute in the issue,) that the defendant is entitled to costs. (*Wellborn* v. *Gordon*. 1 *Murph.* 502. *Battle* v. *Rorke*, *ante* 1 *vol.* 228.) For every judgment on a verdict on issues, must be for costs against one of the parties, and it is clear that the executor cannot recover his

The cases of *Parker* v. *Stephens*, (1 *Hay.* 218,) *Hogg* v. *White*, (*Ib.* 298,) *Nasdale* v. *Branton*, (2 *Ib.* 977,) *Wellborn* v. *Gordon*, (1 *Murph.* 502.) *Battle* v. *Rorke*, (*ante* 1 *vol. p.* 228,) approved.

costs where neither of his pleas proves a bar to the plaintiff. Consequently he must pay them. It is just that he should, if he has any assets, and did not confess them truly, for if he had, the plaintiff might have accepted them and taken judgment immediately *quando*, for the residue of the debt. The pleading of the executor compels the plaintiff to incur the expense of a trial, and these expenses must be paid by him through whose fault they accrued.

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The judgment does not seem to have been entered at length, but if it had been, and expressly *de bonis testatoris* only, or *de bonis propriis*, it is according to Sergeant *William's* note amendable, even after error brought. We think it ought to be made conformable to the rights of the parties, and also that judgment may be rendered on this *sci. fa.* for costs without a suggestion in it of a *devastavit*, as is laid down in *Teasdell v. Branton*, which has been since followed.

It is not competent for this court to pass in the first instance, on the issue joined on *nul tiel record*, but the cause must be remanded to the Superior Court for that purpose.

The judgment must therefore be reversed, and a *procedendo* awarded.

PER CURIAM.—JUDGMENT REVERSED.

JONAS RICKS *v.* GEORGE HAYWORTH.

A bond, given by one who applies to be made defendant in an ejectment, with a condition to be void if he shall pay all costs which may be adjudged against him, does not comply with the requisitions of the act of 1804, (*Rev.* ch. 658) and a *sci. fa.* cannot be brought on it as a bail bond. But it is valid as a bond at common law, and will sustain an action of Debt.

This was an action of DEBT upon a bond for £100 executed by one *William Riley* and the defendant, to the plaintiff, with the following condition:

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"The condition of the above obligation is such, that "whereas *Doe* on the *demise* of *Jonas Ricks* hath insti- "tuted an action of ejectment against *Richard Roe* and "the above bounden *William Riley*, and on motion the "said W. R. hath been admitted to become a defendant "of record in said suit: Now if the said W. R. shall "defend the above suit with effect, or if a recovery shall "be had against him, he shall fully pay and discharge "all such lawful costs as may be awarded against him "by the court, then the above obligation to be void."

The declaration averred that *Riley* had been cast in the ejectment, and that costs to the amount of 103 dolls. had been taxed to the plaintiff, and assigned the non-payment of those costs as a breach of the obligation.

The defendant, after *oyer*, pleaded 1st. *Non est factum*. 2d. That the bond was given under the second section of the act of 1804, (*Rev. ch.* 658,) directing bail to be given in actions of ejectment, and therefore, that the only remedy upon it was by writ of *scire facias*.

Upon the first plea, the attesting witness, who was the attorney of *Riley* in the ejectment, proved that the bond was signed and sealed in his presence—that he had no particular recollection of the delivery of it; but that from his usual course, he presumed that after the bond was executed, he took it and carried it to the clerk's office, and filed it among the papers in the cause, as a necessary preliminary for the rule for making *Riley* a defendant; and in support of this, the plaintiff proved that it had been so filed and was there found after the determination of that suit.

For the plaintiff, it was contended, that if the bond did not conform to the requisitions of the act of 1804, yet that being a voluntary bond, it was valid at common law and would sustain this action.

His Honor Judge Norwood instructed the jury that, from the evidence of the attesting witness, and from the fact of the bond having been filed in the clerk's office, they had a right to presume its delivery. His Honor also held that the bond did not conform to the act of 1804, but was valid at common law.

A verdict was returned for the plaintiff, and the defendant appealed.

Mendenhall, for the defendant.

W. A. Graham, for the plaintiff.

Gaston, Judge.—After stating the facts as above, proceeded:—The counsel for the appellant has mainly rested his case here upon the supposed error in this adjudication.

This is the first occasion on which this court has been called upon to expound the act of 1804, and the untechnical language in which many of its provisions are expressed, has caused some embarrassment in ascertaining the precise meaning of the Legislature. The first section requires that, upon the return of any writ of ejectment, (meaning return of service of the copy of the declaration of ejectment,) the real plaintiff, by which is to be understood the lessor of the plaintiff, his agent or attorney, shall enter into bond "with the clerk of the court," to prosecute the same with effect, or to pay such costs and damages as shall be awarded against him. The second section then enacts, that the persons who shall make themselves defendants in ejectment, "shall on doing the same, either by themselves, "their agent or attorney, enter into bond with good "and sfficient security, to answer such writ or writs "of ejectment in the court to which they may be made "returnable; and abide by the determination of the "same; which defendant or defendants shall be under "the same rules and regulations, and liable to the same "judicial proceedings as to all costs and damages that "may be awarded against him or them, as principal "and bail are subjected to in other civil actions of law "in said courts." The plaintiff insists that the first section expressly requires that the bond therein directed, shall be made payable to the clerk of the court; that the second having directed a bond to be given, and not declaring to whom it shall be payable, necessarily implies that it shall be made in the same form with that

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prescribed in the previous section, and that the instrument in this case, being payable to the lessor of the plaintiff, departs in that respect, essentially, from the bail bond required by the second section. We do not adopt this construction.

The bond of a person seeking to defend an ejectment may be made to the lessor of the plaintiff.

Whenever a bond is directed to be taken, and no special direction given with respect to its form, it must be understood as a bond, to be made payable to him whose rights it is intended to secure, and for whose benefit it is required. The act of 1787, c. 276, made it the duty of every clerk of a Court of Record in this State, before issuing a writ or other leading process against a defendant, to take sufficient security of the person applying for such writ conditioned to prosecute the suit with effect, or in case of failure, to pay the defendant all such costs as should be awarded against the plaintiff. It has been the uniform and universal usage under this act, to make this prosecution bond as it has been termed, payable directly to the defendant in the action. The clerk is to be regarded as the legal agent for the defendant, empowered and commanded to receive this security in the name and on the behalf of the defendant; and not only have innumerable suits been prosecuted effectually upon bonds thus taken, payable to defendants, but since the act of 1831 has raised prosecution bonds to the dignity of records, judgments on bonds in this form are every day rendered in our courts. The act of 1787 made provision for those cases only, in which the suit was commenced by a writ or other leading process issued from the clerk's office. There was no legal provision for a prosecution bond, in an action of ejectment. The first section of the act of 1804 supplied this omission, and required upon an action thus instituted, the same security from the lessor of the plaintiff for the defendant's costs, as had been demanded from the plaintiff, upon the institution of other suits by the act of 1787, and directed the bond, "to be entered into with the clerk,"—that is to say, to be taken by the clerk as the appropriate legal agent of the defendant, as in all other cases.

As the requisition of the first section of the act of 1804

is analagous to that of 1787, in regard to the prosecution bonds, so the provisions of the second section are intended to conform *generally* to the requirement of bail from defendants by the act of 1777, c 115 s16,17. That act makes it the duty of the Sheriff on serving a writ of *capias ad respondendum*, to take bond with two sufficient sureties payable to himself, and to assign over that bond to the plaintiff in the suit, and declares that all bail so taken shall be held and deemed to be special bail, and as such, liable to the recovery of the plaintiff. The old form of the condition of these bail bonds, approved by this court in the case of *Rhodes* v. *Vaughan*, (2 *Hawks*, 167) is, to make his personal appearance before the court and then and there to answer to the plaintiff in the action, and to stand to and abide by the judgment of the court.—The first part of the condition of the bail bond under the act of 1777 is omitted in that required by the act of 1804, because in the latter no process has been served, the tenant in possession has only been invited to make himself defendant, is under no obligation to appear, and is to give the bond after he shall have appeared and prayed to be admitted a party defendant. Under the act of 1777, the bond is to be taken to the Sheriff and afterwards assigned to the plaintiff; because it is designed to secure the double purpose of bail for appearance and bail to the action. In the latter, it should be given directly to the plaintiff, because it is to effectuate but the one purpose of securing bail to the action. With the exception of that part of the bail bond which stipulates for the appearance of the defendant, the conditions of both bonds are identical. We have not been without difficulty upon the question, whether the obligation did not vary from that prescribed in the act of 1804, in being made payable to the lessor of the plaintiff, instead of the nominal plaintiff. We are satisfied that it would be more consistent with the regularity of judicial proceedings, that the bond which, by the act, is substantially made part of the record in the action of ejectment, and on which judicial writs may issue to enforce the recovery of the plaintiff in that action, should be made to

That bond is in all respects similar to bail bonds required by the act of 1787, (*Rev. ch.* 276) except that it is not made to the sheriff, and does not require the defendant to enter his appearance.

It seems that it should be made to the nominal plaintiff.

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him whom the record recognizes as *the plaintiff*, and this is the form which we would advise to be pursued. Indeed, we can perceive great perplexities and embarassments which may follow from any other course, where there are several counts on the demises of different lessors, and there is a recovery on some and not all of these counts. But as in this act the Legislature speaks of the lessor of the plaintiff as the real plaintiff, and as for many purposes he is considered in law the plaintiff, (*Aslin* v. *Parkin*, 2 *Bur.* 665) and as in the present case no inconvenience could result from a bail bond being made to the lessor of the plaintiff, instead of the plaintiff on record, we should hold this to be a bond conforming to the provisions of the act of 1804, and fit to be proceeded on, as such, by the peculiar remedies prescribed in cases of bail, were it not for other objections to it, which we proceed to consider.

The condition in this bond omits the material stipulations which the act of 1804 distinctly requires to be inserted in the condition of the bonds under that statute; and substitutes for them other stipulations, perfectly intelligible, and not of equivalent import. The condition of the bond prescribed by the statute is, "to answer to the writ, i. e. the action, of ejectment in the court to which it may be made returnable and abide by the determination of the same." The *legal* meaning of these terms and the nature and extent of the duty secured by them are clearly defined. They constitute an undertaking, that if the defendant be condemned in the action, he shall pay the costs and condemnation or render himself up a prisoner, or that the bail will pay the costs and condemnation for him. The condition in this bond allows the penalty to be saved only in one of two modes. Either the defendant must defeat the action of the Plaintiff, or make *full* payment of all costs that may be adjudged against him. Under the bond, as prescribed by the statute, the bail can always discharge themselves from liability by a surrender of the principal; are discharged by his death at any time before they are fixed with the debt; and cannot be subjected to the plaintiff's

demand until after an ineffectual attempt by a *capias ad satisfaciendam* to seize the defendant's body. It is perfectly clear that a surrender of the body of *Riley* would not be a *performance* of the condition of *this* instrument. It is equally clear, that if *Riley* should die after a recovery against him for the costs of the ejectment, *his* death would not be a payment of those costs within the words of this condition, and if we regard the plain meaning of terms, the condition would be broken when once *Riley* should refuse to make payment of the costs recovered, whether a *ca. sa.* or any other execution had been sued out against him or not. We cannot therefore regard an obligation which contains stipulations plainly variant, both from the ordinary terms, and from the legal import of those required by statute to be inserted, in an instrument, to which instrument it gives a peculiar dignity, and on which it prescribes an extraordinary remedy, to be and to constitute that very instrument, without altering the contracts of parties; and interfering with the law which they had a right to prescribe, and which they have prescribed for themselves, on the subject matter of such contracts. Where the law has not defined the meaning and prescribed the effects of terms, those used in the contract must be understood as meaning what they obviously import, and producing such results as the intent thereby declared ought to operate.

We are thus conducted to the conclusion, that the obligation on which the plaintiff declared, was not a bail bond made in conformity to the requisitions of the act of 1804, and therefore could not have been proceeded upon as such by *scire facias*. It is however an obligation in due form between parties able to contract, containing no stipulations contrary to morals, to policy, or to positive statute; and if validly executed, is fit to be enforced by the ordinary remedies which the law gives when such obligations are broken. The only objection to the execution of the instrument is to be found in the exception to the charge of the judge, with respect to its *delivery*. The attesting witness, who was the attorney of *Riley*, in the action of ejectment, stated he had caused

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the bond to be executed, and that from his ordinary practice in such cases, he believed he had filed it away among the papers of the suit, for the purpose of enabling *Riley* to become a defendant. And it appeared from the records that the bond was so filed when *Riley* became defendant. The judge instructed the jury that from this evidence, they might presume a delivery.—We are satisfied with the correctness of this instruction. An instrument under seal is made payable to the plaintiff, it is deposited in a place of safe keeping accessible to him, and for the purpose of securing to him the benefit which that instrument confers, he has accepted it, claims the instrument as his, takes it as his, sues upon and produces it as his. It is not only evidence from which a jury might infer delivery—but from which, if believed, they could not rationally decline to infer it.

Its delivery may be inferred from proof of its being signed, sealed, and deposited in the office of the court where the action is pending.

It is the opinion of this court, that there is no error in the judgment which has been rendered against the defendant below, and that it must be affirmed with costs.

PER CURIAM.—JUDGMENT AFFIRMED.

THE COMMISSIONERS OF PLYMOUTH
v.
JOHN C. PETTIJOHN.

An ordinance of the Commissioners of a Town, directing, under a penalty, cattle to be penned at night, applies only to residents of the Town; not to those living beyond the corporation limits, although their cattle may stray into the Town.

This was a WARRANT brought by the plaintaiff for a breach of an ordinance of the Town of Plymouth, in the following words:

"Whereas the Commissioners of the town of Ply-
"mouth view the practice of suffering cattle to lie in the
"streets thereof after night, not only as a common nui-
"sance, but as highly dangerous to persons coming in-

"to town after night. Resolved therefore, that the "owner of such cattle shall cause them to be penned dur- "ing every night, by or before dark, under the penalty "of fifty cents for each omission, and for each and eve- "ry cattle beast not so penned. And all cattle found in "said streets, between dark and day-break, shall be ta- "ken up and penned by the town constable, or other "person appointed by three or more of the commission- "ers for the time being, and turned out every morning."

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Upon the trial before his Honor, Judge DANIEL, at Washington, on the Fall circuit of 1829, the plaintiff having made out a *prima facie* case, the defendant proved that he lived out of the limits of the town. His Honor thinking this fact to be a complete defence, the jury found for the defendant, and the plaintiffs appealed.

No counsel appeared for either party.

RUFFIN, Chief-Justice.—This is a warrant for a penalty for not penning a cow in the night time, contrary to an ordinance of the Commissioners which is set out at large in the case.

The act of incorporation enables the Commissioners to make all such ordinances, rules and regulations for the good government of the town, not inconsistent with the laws of the State, as to them shall seem fit; and to enforce the observance of them by penalties not exceeding ten dollars; and also in particular to prevent and remove nuisancies. The by-law requires the owners of cattle to pen them every night, and for each omission, gives a penalty for the use of the town, of fifty cents.

The defendant is not an inhabitaitant of the town, nor member of the corporation; but his cow was found lying in the streets, once after night; for which this penalty is claimed. In the Superior Court, it was held, first, that the defendant was not within the meaning of the ordinance; and secondly, that if he was, the Commissioners had not the power to make a by-law binding on him.

If the opinion on either point be correct, there is no cause of action, and the judgment must be affirmed.

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The latter is the more general question, and is interesting from its bearing upon the regulations of a wholesome police in towns and villages, and upon the powers of their corporate authorities over the citizen and his property. It is probable that such ordinances are not uncommon; and therefore it is to be regretted, that the question of their validity, or the extent of their validity should not have been discussed upon this occasion, that the court might have been called on or felt authorised to decide and settle it. The case has stood over for several terms for that purpose, as there was no appearance on either side, and we supposed that to be the point of most concern to both parties. It has at last, however, been submitted without argument, which, upon a principle prescribed to all Judges by a proper self-respect and a due regard to the saving of the rights of third persons, induces us to confine our opinion as being definitive, to such points as are absolutely necessary to the adjudication in this particular suit.

The practice forbidden in the ordinance is of public inconvenience, and the suppression of it a fit and proper subject of town regulation. The penalty is within the sum limited in the charter; and for that reason, must probably be admitted by the court to be reasonable.—If it were competent for us to hold otherwise, we should deem this, which inflicts a penalty of only fifty cents, to be, as respects this point, valid. Nor do we doubt that all the corporators are bound by the ordinance as operating either upon the thing creating the nuisance or inconvenience, or upon them personally; because it concerns the interest of their whole community and also derives an obligation from the consent, expressed or implied, of every member.

One who is not a corporator, but who comes into a corporation, and violates any of its ordinances, is subject to the penalties imposed therefor.

There seems as little reason to question, that one not a corporator, but who comes within the limits of a town, and there violates a police regulation sanctioned by a penalty, becomes as liable to pay it, as if he were a member. For a local jurisdiction is vested in the corporate authorities, which embraces all persons and things within its local bounds; and he who comes with-

in the limits is no longer a stranger, but, for the time being, is subject to the jurisdiction as an inhabitant. So too, it may be yielded of things, as well as persons.— The cattle of a stranger straying into the town and there becoming nuisances, or found damage feasant, may be removed, by way of abating the nuisance; and probably, may be distrained and impounded until the owner shall pay the expenses and such pecuniary mulct as may have been before imposed.

Whether the commissioners of a town have power to forbid cattle to range in its streets, and to impose a penalty upon the owner, or distrain the cattle? Qu.

But the question in this case is, whether there is a power, under the laws, in the Commissioners, not only to deal with the beasts in the manner supposed, but, in the first instance, to impose a penalty upon the owner for the use of the town, to be answered by him in his person or other property, he being a stranger, and having done no act within the limits of the town? Upon it the court gives no opinion; though we do not wish to conceal that we refrain the rather, as the case stands before us, from a sense of the impropriety of expressing conclusively, than from the difficulty of making up one.— The point is, however, thus distinctly stated and left undetermined, in order that, upon its arising in future, it may, as one involving the supposed and practised powers of local corporations and the rights of the citizen, be fully considered and discussed.

Admitting the power to ordain such penalties in general, it is sufficient for the defendant in the case before us, if the ordinance itself does not extend to him. Such, we think, is its true construction. If an act of the corporation can bind persons beyond its limits for acts of omissions within them, yet, as those limits are the bounds of the jurisdiction, ordinances in general terms, are to be regarded as naturally referring to persons and things which are both within the place, and to those only.— When an offence is made to consist of the omission to do an act in the town, he only is within the purview of the law, upon whom, by that or some other law, the act is imposed as a duty to be performed within the town. General terms used in reference to such a duty and penalty are restrained by the subject matter, and cannot

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be extended to persons, who have no rights to be exercised and no duties to be performed within the place, since that would be to render them liable, not for the omission within the town (which is the specific offence,) but for the consequential evil resulting from the omission of a similar act at another place, at which it was not a duty. There ought to be express or plain words to include such persons, which are not found here.

The ordinance recites that the practice of letting cattle lie in the streets after night had become a dangerous nuisance; and then provides, 1st. that the owner of cattle shall pen them every night, by or before dark, under the penalty of fifty cents for each omission; and 2dly: that "all cattle found in the streets between dark and day-break, shall be taken up and penned by the town constable, and turned out the next morning."

There are two objects in the ordinance, which are altogether distinct. The one is, to abate the alleged nuisance; which is to be effected by taking any cattle found there, out of the street, and confining them for the night. This operates upon the thing then within the town, and is expressly extended to all cattle there being, no matter to whom, or where belonging. The other is to prevent the danger of future nuisances, and avoid the trouble and necessity of abating them, by giving penalties for those acts deemed most likely to produce them, whether they should in fact produce them or not. The penalty is against the owner of a beast for not penning it. The question is what owner is meant? Clearly, an inhabitant, owning cattle. The penalty is not given for any cattle found in the streets, but for any not penned. It is not given for the nuisance, but for an act tending to produce it, and is a reasonable precaution against an inconvenience incident to beasts owned in the town. Such an owner incurs it, although his unpenned cattle may not stay in the streets, but stray into the country or upon the lots of other persons. They probably will lie in the streets, and may properly be required to be confined by the owner as a matter of police. But strangers are, by the general law,

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under no obligation but to avoid the making a nuisance or doing an injury, and then only to answer for the actual damage. The town has no interest that a person, not within it, should pen his cattle, nor power to compel him. All that can be required of him is, to keep them out of town. That is fully provided for in the bye-law, in a different manner, namely, by impounding. Whether a penalty could be given in such case for the cattle coming into town, is the general question left undecided. But here it is confined by the words of the ordinance to the omission by the owner to pen his cattle; which shews, that the person meant is such owner, being an inhabitant of the town or within its jurisdiction.

PER CURIAM.—JUDGMENT AFFIRMED.

MERRIMAN FEATHERSTON v. WILLIAM MILLS.

The act of 1798 (*Taylor's Revisal, Appendix*) establishing a court of patents, does not enable the patentee in a junior patent to repeal an elder one, although his entry was prior to that of the patentee in the latter.

The cases of *Crow* v. *Holland* (*ante p.* 417,) and *Hoyle* v. *Logan* (*ante p.* 495) approved.

This was a PETITION and SCIRE FACIAS to repeal a grant. On the Fall circuit of 1832, at Buncombe, before SWAIN, Judge, the facts were, that the plaintiff had made his entry on the 18th of April, 1801, and obtained his grant on the 12th of December, 1812. The defendant made an entry which included a small part of the land covered by the grant to the plaintiff, on the 22d of January, 1807, and obtained a grant on the 27th of January following.

The presiding Judge, upon grounds wholly distinct from that taken in this court, vacated the grant to the defendant, and he appealed.

No counsel appeared for either party.

RUFFIN, Chief-Justice.—The great importance of the questions arising under the act of 1798, in their bearing on individual rights and the public repose, and the doubts

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be extended to persons, who have no rights to be exercised and no duties to be performed within the place, since that would be to render them liable, not for the omission within the town (which is the specific offence,) but for the consequential evil resulting from the omission of a similar act at another place, at which it was not a duty. There ought to be express or plain words to include such persons, which are not found here.

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RUFFIN, Chief-Justice.—The great importance of the questions arising under the act of 1798, in their bearing on individual rights and the public repose, and the doubts

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which seem to be entertained upon them in the profession, has called for the most deliberate consideration of them, on the part of the court. It is gratifying to us, that numerous cases have been brought up, in which respectively those questions are presented in almost every varied form of which they are susceptible, and that some of them have been argued, at the bar, with an ability which has greatly aided the court in arriving at conclusions satisfactory to ourselves, and founded, as we think, on clear principles and authorities. In *Crow* v. *Holland*, (*an.* 417) we have held that a private person is not entitled to use the name of the State and her remedy, as sovereign, to repeal a grant, which did not aggrieve him at and by its emanation; in other words, that only an elder patentee, or he who had prior right, can sue a *scire facias*. In *Hoyl & others* v. *Logan*, (*an.* 495) we have further held, that the privilege thus belonging to the elder title ceases with the right to which it is an incident; and therefore, that the party must continue to be entitled at the time of resorting to this remedy. Hence a bar to his right of entry, such as the statute of limitations or a conveyance from himself, is also a bar to the *scire facias*. For he is then no longer a person grieved, but an officious intermeddler.

The present is a mixed case. The relator's patent is junior to that of the defendant, but his entry is prior; and the question is whether that is, within the act of 1798. We think very clearly that it is not. We see no reason to doubt that as between the State and the defendant, the land, when once entered, is no longer the subject of re-entry and of grant, if the first entry remains in force, and is finally perfected, more than it would be if the first enterer had also obtained the first grant. The second entry is void by the words and in the sense of the act of 1777, as well when there is a prior entry, then valid and on which the party, entitled by it, proceeds to complete an apparent title, as when such completion has taken place before the second entry or the grant founded on it. But the enquiry is, against whom and in what sense is it void, and how is advan-

tage to be taken of it? It is void against the State, being founded on the false suggestion, that the land had not before been either granted or entered. Is it so as against the first enterer himself? The question implies in its terms, that the party's title consists of his entry alone; and the decisions already made shew in that alone it must consist, for as a junior patentee he has no remedy under the act of 1798. The entry has never been considered as a legal title, or as at all constituting a part of the title at law.

It is not given in evidence in ejectment, to support the grant by shewing an authority in the officers of State to issue it. Perhaps this would at once be a conclusive answer to the petitioner, since this proceeding by *scire facias* is strictly at common law, and within the jurisdiction of the Chancellor derived from that source. (4 *Inst.* 88). But there is a better reason, founded in the nature of the right by entry and the defences against it. It is an equity, which upon the payment of the purchase money, entitles the enterer to a grant, if applied for in due season; and also entitles him to call for a conveyance from one who has already obtained a grant for the same land, with notice of the previous entry. That such is the idea of the right by entry, is clear from many circumstances. Entries are not made the subjects of legal jurisdictions in any but the excepted case of a *caveat*, as provided in the act of 1779, which arose upon the discontinuance of the land offices. Decrees have been frequently made in equity for the first enterer against the first patentee. They repel the position, that the grant as between those parties, is void. They are founded in the very contrary position, that they are not void, but that the grantee is a trustee for the claimant under the prior entry. The decree proceeds precisely on the same ground with one against a person, who, having notice of an unregistered deed, takes a conveyance to himself, and registers it first. The first deed is not made valid at law by the notice, nor the latter invalid, but the last purchaser is held to have taken his legal title, by reason of the fraud, in trust for the first purchaser. For

An entry of land is a mere equity to demand a grant upon paymennt of the purchase money in due time, and is not noticed at law, except in cases of *caveats* under the act 1777, (*Rev. c.* 114.)

And upon a proper case, one who first enters land, has relief in equity against

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another who obtains a grant for it with notice of the entry.

that reason the first enterer has relief in equity. It is founded on the proper ground, namely the fraud on himself. When he seeks relief on the different ground, that is to say, a fraud on the State, he must show himself to be a person to whom the law has delegated that privilege. By the act of 1798, it is to be exercised in a court of law; and it follows to our apprehension, that he only can be said to have it, who can show a title which that court can recognise, investigate and adjudge, and against which a mere equity on the other side, would be no answer. We think the statute did not intend to enlarge the jurisdiction of the common law courts, so as to embrace some of the nicest equities, and involve them in issues to be submitted to a jury.— But what confirms us entirely in this opinion, is, that there is no necessity for such a jurisdiction, and therefore, it is not to be presumed, that it was intended to be created by the general words "persons aggrieved."— The purpose was to give a remedy to those who had none before. The first enterer had at that time an adequate and complete one in equity. Two were not necessary; and either it must be supposed that two are given in the same case, or that a less perfect claim under the entry will be sustained at law than would authorise relief in equity: and neither supposition is admissible. There is also this farther reason: a court of equity measures its relief according to the rights of the parties and holds the defendant a trustee for the various persons entitled to the extent of their rights respectively. If the first entry be for a part only of the land granted, so far only is the title of the grantee defective and a trust declared. This is manifestly the justice of the case. But under the statute, the grant is void for the whole, if it be so as to any part, and the judgment is that it and the enrollment be revoked, annulled, cancelled and vacated. The case before the court is an example of this kind.— The grant to the defendant covers but a small part of the plaintiff's entry, and includes other lands not entered by him. A judgment against the defendant would avoid his grant *in toto*, while the plaintiff has an equita-

ble interest in only a portion of the land. To this the defendant must submit, in a case where the plaintiff has no other remedy but the one which cancels the grant; because his rights must yield to the superior rights of the opposite party. But in putting a construction on the statute, as to the persons to whom this remedy is given, this is a sufficient reason for confining it to those who are without any, but under the statute.

The Court will not be understood as expressing an opinion, that the mere circumstance that lands included in an elder patent or entry are covered in whole or in part by a younger one, does render the latter void within the statute: For it is our purpose to avoid any determination beforehand, upon the cases which the act embraces, or may be supposed to embrace.

We all think that for these reasons, the judgment of the Superior Court must be reversed, and judgment be rendered for the defendant, notwithstanding the verdict.

PER CURIAM.—JUDGMENT REVERSED.

JOSEPH SOUTER v. DAVID DAVENPORT.

A variance between the bond declared on and that produced in evidence, can only be taken advantage of upon the trial; it forms no ground for arresting the judgment.

This action was originally commenced by a warrant in which the defendant was to answer the plaintiff "in a plea of debt, the sum of one hundred dollars with interest."

The plaintiff was nonsuited before the magistrate and appealed to the County Court of Buncombe, where he obtained judgment for $97 84, principal and $6 08, interest. From this judgment, the defendant appealed to the Superior Court, where the cause was tried at the special term held in July last, by his Honor Judge MARTIN. The plaintiff produced a bond of the defendant's

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for $ 350, upon which several payments were endorsed, and obtained a verdict for the balance due, viz: $96 48. The defendant then moved in arrest of judgment, upon the ground of a variance between the warrant and the bond, which motion being overruled and judgment rendered upon the verdict, he appealed.

No counsel appeared for either party.

GASTON, Judge.—After stating the facts as above, proceeded:—The cause has been here submitted without argument, and the only error assigned by the appellant is clearly not sustainable. After verdict, it appears that defendant's counsel moved in arrest of judgment upon the ground that the warrant which was the plaintiff's declaration, and the bond offered in evidence, did not correspond; which motion was overruled by the court. Had there been a variance, which we by no means admit, the objection should have been taken on the trial. A motion in arrest can only be founded on some *intrinsic* cause appearing upon the face of the record.

The judgment is to be affirmed with costs.

PER CURIAM.—JUDGMENT AFFIRMED.

ASHLEY SWAIM v. THOMAS FENTRESS.

The writ of *certiorari* is used in this State as a writ of false judgment, and as a substitute for an appeal. It never has been allowed in lieu of a writ of error. The latter writ being entirely efficacious for five years, there is no need of the former during that period, and after its expiration, the *certiorari* being discretionary, should not be granted, as thereby the limitation to writs of error would be avoided.

The facts of this case, as collected from the record, are these: *Fentress*, on the 24th November, 1818, sued out an original attachment against one *Williams*, returnable to the County Court of Randolph; in which *Swaim* appeared upon the first notice served on him as garnishee,

and made his garnishment on 6th February, 1821, at which term there was a conditional judgment of condemnation of the sum in his hands sufficient to pay the recovery the plaintiff might make. At November, 1821, a judgment by default was entered against the defendant *Williams*, and at February following, the writ of inquiry was executed & final judgment entered against *Williams* for the sum assessed and costs, and also of absolute condemnation of so much in the hands of the garnishee as was sufficient to satisfy the same. On the 28th Jan. 1829, *Swaim* applied for a *certiorari* and *supersedeas* upon his affidavit, stating that when he had made his garnishment, counsel had advised him, that an attachment would not lie against *Williams* upon that cause of action, and that he then believed the suit was ended; but that about two years afterwards an execution issued against him on the judgment, when he again applied to other counsel to have it set aside for irregularity, and was informed that it had been done; since which time he had not heard any thing of the case, until, just before this application, he discovered that process had been kept up against him, and that execution was then out.

On this affidavit a *certiorari* was granted by Judge MARTIN, and on the return of it with the record, various counter affidavits were filed upon the merits.—But it was insisted on behalf of the plaintiff in the *certiorari*, that it was immaterial how the merits were; for that the judgment against him, as garnishee, was void, because the attachment was not at first served on him, but on another person, who disclosed that he, *Swaim*, was *William's* debtor, and he was then summoned and made his garnishment; whereas an alias attachment should have been levied in his hands; and also for that, the judgment against the principal defendant, *Williams*, was void, because an attachment would not lie for the demand therein sued on, and because there was no sufficient affidavit of the demand, and because the attachment was not under the seal of the justices of the peace. For these reasons, his Honor Judge NORWOOD, at Randolph, on the last circuit, sustained the writ, and made

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the *supersedeas* absolute; and the defendant in the *certiorari* appealed to this court.

Mendenhall, for the defendant.

No counsel appeared for the applicant.

RUFFIN, Chief-Justice.—After stating the record of the attachment against *Williams*, and the facts as above mentioned, proceeded as follows:—Deeming this, for the present, an appropriate remedy, for the applicant, we are far from thinking he has entitled himself to it. It is intended to supply the place of an appeal, of which the party has been deprived, or which he has lost by accident; and is an extraordinary remedy, accessible only to one who has been injuriously denied the ordinary one of appeal, or who has merits, and has been diligent, as far as he could be, in applying for this. The case upon the merits is abandoned from necessity; for upon looking into the garnishment, it is clear the party owed the debt condemned in his hands, and that it was the subject of condemnation. But if it were otherwise, no sufficient reason is given for not praying an appeal, nor excuse for delay in making this application. The suggestions of Counsel as to the future disposition of the case were altogether inadequate to authorise the total inattention to its progress. We should think therefore upon these grounds, that the *certiorari* ought to be dismissed. But as the decision was not made upon them, it is proper the court should further consider the other points.

The opinion of counsel as to the probable issue of a suit, does not justify a party in neglecting to appeal.

We understand his Honor to annul and reverse the judgment of the County Court, as erroneous, or to declare it null and void in itself. We are not aware of any power in one court to supersede the judgment of another by direct order, as being merely void. The court itself, whose judgment it is, may expunge it, or when acted on, another court may pronounce it inefficacious to authorise the acts professed to be done under it. The proceedings of inferior magistrates, not according to the course of the common law, may be reviewed and quashed by a court of general superintending jurisdic-

The Superior Court may, by writ of error, reverse the judgment of the County Courts, but cannot, in any way, quash them, or supersede them as nullities.

diction. But not so of those of a court of record, proceeding according to the common law and having jurisdiction. They may be reviewed and reversed, but not quashed or directly superseded as nullities upon having the record brought up. *Whitly* v. *Black*, (2 *Hawks* 179). Regarding this writ however, as bringing up the record and judgment to be reviewed in the matter of law, it is our opinion, that it cannot be sustained. It might be questioned whether any or all of the alleged defects would entitle the plaintiff to reverse the judgment. That which he relies on, as being the specific error in the judgment against himself, we think is not an error. The statute authorizes and directs the garnishee to be summoned twice before a judgment shall be entered against him, for want of appearance; but if he appear and answer upon the first subpœna, the second is unnecessary and not required. Whether the garnishee can allege errors in the process or judgment against the defendant in attachment, or whether these are such as he can assign; or whether they be errors for which the judgment should be reversed on a writ of error, might all admit of debate. But the court does not deem it necessary to express an opinion on them; because admitting the affirmative throout, it seems clear to us, that a *certiorari* is not the proper mode of taking advantage of them, but only a writ of error; which it has been held, lies for a garnishee. *Haughton* v. *Cox*, (*Conf. Rep.* 157).

The writ of *certiorari* has been used here as a writ of false judgment, or in aid of that writ. It has also been used as a substitute for appeals allowed by our law for a second trial of facts. Its most frequent and important application in this State has its foundation in the right of appeal for that purpose. But it never has been allowed as a substitute for a writ of error, and where one would lie, to bring under review mere matter of law apparent on the record of the County Court. It never can be allowed for that purpose; because there is no necessity for it, since a writ of error operates, under our statute, after security is given, as a supersedeas, and relieves

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the plaintiff in error, until a judgment of affirmance.—That writ can be sued at the parties' pleasure, until the expiration of the period by which it is limited, and when the law does not suffer errors to be regarded, even if they exist. During that period, the party must be confined to the remedy by writ of error, because it is complete and could not be more so upon *certiorari*. After that time has elapsed, certainly the writ of *certiorari*, which is extraordinary and merely discretionary, cannot be granted; for that would be an evasion of the law limiting writs of error and giving a substitute for a remedy which is itself barred. Upon each principle, the judgment must be reversed and this writ dismissed. Here no issue of fact was joined between the plaintiff and the garnishee; but the judgment was on the confessions in the garnishment itself. If erroneous, the garnishee might have appealed at the time or sued his writ of error within five years as his next best and common law remedy. That being adequate, a *certiorari* could not be useful or granted to him. It was not a fit case for that writ; but if it were, he could not have it after five years, by which all errors are cured and the judgment irreversible in any way. Here, there were eight years from the judgment against the garnishee, and about seven from the final one against him and the defendant, before this writ was sued out.

The judgment of the Superior Court must therefore be reversed, and the *certiorari* dismissed, and judgment rendered under the statute against the plaintiff in the *certiorari* and his sureties, for the amount of the recovery in the County Court, and the costs there, and also, for the costs in the Superior Court and in this Court.

PER CURIAM.—JUDGMENT REVERSED.

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THE STATE v. NORMAN GILLIS.

Where upon the trial of an indictment for arson, the evidence was that the prisoner had in his possession bank notes similar to some stolen from the house, when the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them, an instruction to the jury that these contradictions were evidence to prove that he did not come honestly by them, is not erroneous. And these declarations lead to prove the guilt of the prisoner.

This was an indictment for ARSON in burning the dwelling house of one *McKendre*, in Moore county.—The evidence was entirely circumstantial. It was proved that the last time *McKendre* left his house, just before it was burnt, there was in it a chest which, among other things, contained two bills of a hundred dollars each, one of fifty and one of ten dollars—all issued by the Bank of the United States: that directly after the arson, this chest was found in the woods near the house, broken open and rifled of its contents. That the prisoner was entirely destitute of personal property. That he pretended to go to the south for the purpose of obtaining money for a horse, which he alleged he had sold upon a credit. That two days after the arson, he was sixteen miles below Fayetteville, and was then in possession of notes similar, in their amount and number, to those taken from the chest, and stated that he had received them for the sale of his crop of Cotton—that on another occasion, he said he had obtained them by building a house in the State of Tennessee—that a few days afterwards, he was in Wilmington when he bought a coat and paid for it in a note of the Bank of the United States for fifty dollars—that from Wilmington he went to Fort Johnston, on his way to Charleston, and while going down the river was seen in possession of two bills of the Bank of the United States for one hundred dollars each—that at Fort Johnston, he professed to be desirous of going to Charleston, to collect money due him for the sale of a horse—that he then stated that he had raised the money in his possession by the sale of a ne-

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gro, before he left home—that although there were two modes of conveyance from Fort Johnston to Charleston, he embraced neither, but returned to Wilmington, where he exchanged two United States Bank bills of one hundred dollars each for others, giving a premium of two and a half per cent—that soon after this, he was seen in Bladen county, when he said he had been to Charleston, and was on his way home to pay off an execution which had been levied on his land; and that there, he expressed a wish to exchange two hundred dollars for South-Carolina Bank notes, saying that directly after his return he should travel, and that money of the latter description would suit him best.

His Honor, Judge SEAWELL, in his charge to the jury, explained to them the purpose, for which the various circumstances above mentioned, had been offered in evidence, and left it to them to say, whether those circumstances satisfied their minds of the guilt of the prisoner beyond a rational doubt. If they did, that it was their duty to convict him. His Honor also instructed the *jury*, that the giving inconsistent and contradictory accounts in relation to the manner in which the prisoner said he obtained the bills, was evidence to prove that he did not come honestly by them. The prisoner was convicted and judgment of death being pronounced, he appealed.

Badger, for the Prisoner.

The *Attorney General* for the State.

GASTON, Judge.—To assist juries in complicated cases to arrive at a correct conclusion upon disputed facts, by advising them as to the nature, bearing and tendency of the proofs; but at the same time to withhold any intimation of an opinion as to the weight of the whole or any part of the testimony, is one of the arduous duties which the law enjoins upon Judges who preside at the trial of issues. This duty is the more important and the more difficult, where the evidence is entirely circumstantial, where the quality of each circumstance is to be precisely ascertained, and the effect of them combined, accurately determined by the triers. And it swells into

one of awful magnitude, when the issues of life and death depend upon its faithful, correct, and judicious performance. The exception made in this case, imposes upon us the responsibility of examining, whether the prisoner has well founded cause of complaint of the manner in which this duty was discharged by the Judge below.

The exception is directed solely to that part of the charge, in which his Honor instructs the jury, that inconsistent and false declarations of the prisoner, in relation to the manner in which he obtained the bank-bills in his possession, were "evidence to prove that he did not come honestly by them." It is insisted that this instruction was erroneous, for that in the first place, such inconsistent and contradictory declarations do not in law prove more than that *some* of them are false; and secondly, that if they amount to proof of a dishonest acquisition, they do not, as the judge intimates, furnish evidence that the prisoner stole the bills which the prosecutor lost, or committed the arson of which he was accused. To form a correct judgment of the validity of the objections, it is indispensable that we should first ascertain the meaning of the instruction to which they apply. Are we to understand the judge as having declared that the contradictory statements did prove a dishonest acquisition; or only, that they were evidence having a tendency to prove it, relevant to that purpose, and fit to be weighed by the triers, with a view to the determination of that fact? We cannot doubt but that the former is *not*, and that the latter *is* the sense of the instruction which he intended to give, and which the jury understood his words to convey. The difference between proof of an allegation, and evidence to prove an allegation, is so obvious that we cannot permit ourselves to believe that it was overlooked by the judge, or confounded by the jury. It is pointed out in the beginning of "the statement" which forms a part of the transcript. "*The evidence* was entirely circumstantial, and *consisted of the testimony* of witnesses *to prove &c. &c.*" The statement pretends not to affirm that any facts were *proved*,

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but sets forth the evidence offered *to prove* them, in order that the bearing of the instructions upon testimony might be seen and determined. It was the duty of the judge to shew the jury, the application of the evidence to the material facts in controversy; and it was also his duty to refrain from the expression of an opinion whether it did or did not prove such facts. His language is appropriate to the former purpose, and is within sphere of his legitimate province; and we cannot from a weak and overstrained humanity, or in a spirit of perverse criticism, conjecture, that it may have been designed to effect, or without intention may have effected, the latter purpose, and thus invaded the province of the jury.

Satisfied that this was the instruction given, we proceed in the exercise of our defined and limited jurisdiction, to enquire whether in this instruction there be legal error. And upon an anxious and deliberate consideration of all that has been urged in argument, and of all which our own reflections can suggest, we are bound to declare that we see no error. Contradictory declarations with respect to a fact, do not indeed, absolutely and directly, prove more than that all of them cannot consist with the fact: *All may, some* of them *must* be untrue. If made by an individual in regard to a matter of which he has positive knowledge, he is guilty of falsehood. But the fact of falsehood once established, it becomes, in many cases, an important piece of evidence to ascertain other facts—the causes which induced, and the ends to be promoted by a resort to falsehood. There is direct testimony of an arson, committed under circumstances, clearly indicating that a robbery was at the same time perpetrated by the incendiary. An individual, who before the commission of these crimes was destitute of money, and of property, immediately thereafter quits the neighborhood, travels to a considerable distance to and fro without an assignable motive, is in the possession of four bank bills, constituting a large sum of money, corresponding in amount, and in the character and the respective denominations of the bills; with those stolen from the prosecutor, and busies himself in con-

verting these into bills of another kind, and of less value, for which he gives a premium.

No mind capable of drawing a conclusion from connected facts, can hesitate to acknowledge that such testimony strongly attaches to this individual, the charge of the theft and the arson. But in addition to these facts, there is another circumstance. In the course of his wanderings, he gives many relations to different persons at different places, with respect to the manner in which this money, so strangely in his possession and so strangely used, has been acquired by him; and these relations are wholly inconsistent with each other. The connection between such conduct and the motives for it, the consciousness which it indicates, and the interests which are intended to be served by it, are unquestionably matters well meriting the consideration of those, whose grave duty it is, by all the means in their power, to ascertain the truth of the imputed charge. Falsehood, diversified in its forms, but always repeated on this point, clearly *tends* to shew a consciousness of dishonest acquisition, and a solicitude to embarrass inquiry and to prevent detection. That it *proves* dishonest acquisition is not an inference of law, nor was it the instruction of the Judge; but that it is relevant to *that fact*, and is evidence for that purpose, fit to be considered and weighed by the jury, seems well warranted by reason, observation and experience. Whether by itself or in connection with the other matters testified, it produces a conviction so settled and undoubting as to induce the Jury to infer that fact, as one proved to exist, must be left, as it has been left, to their integrity, their intelligence & their acquaintance with the ordinary concerns of human life. We see no intimation of opinion from the Judge that a dishonest acquisition of the money, in the prisoner's possession, was evidence that he stole the money lost by the prosecutor, and committed the arson charged in the indictment. But it does appear to us, that the fact of such dishonest acquisition, supposing it established, is a circumstance which much strengthens the other evidence, as to the identity of the bills taken from the prosecutor, with those disposed of by the prisoner. Both sets had

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been shewn to for the same amount; to consist of bills of the same bank, and each bill of each set to be of the same denomination. The prisoner acquired what he disposed of, at the time when the prosecutor lost his.—These were strong co-incidences. Add to them that the prosecutor had his taken away *dishonestly*, and the prisoner acquired his *dishonestly*, and who does not feel its force? When better evidence cannot be had, circumstantial proof is as admissible to identity of things or of persons, as to any other matter. No objection was taken to the admission of any part of the evidence offered to establish this identity, and unless it be in law inadmissible for this purpose, we are bound to consider it of a proper character, and fit therefore to be heard and considered. The *sufficiency* of the evidence either to identify the property stolen, or to establish that the thief was also the house-burner, or to shew that the prisoner was both, are enquiries into which we cannot enter. These were proper enquiries, *first* for the exclusive and unbiased decision of the jury—and *afterwards* of the Judge who presided at the trial. The case shews that both have made these enquiries, each in the order prescribed by the law, and both of them, no doubt, in the conscientious discharge of duty. After explanation of the purposes for which all the various circumstances had been given in evidence, the Jury were instructed that "if these circumstances satisfied their minds, beyond a rational doubt, of the guilt of the prisoner, it was their duty to convict him; but unless they produced this full satisfaction, it was their duty to acquit him." Thus instructed, they have on their oaths pronounced him guilty. The Judge from whom a new trial was asked, upon his oath "to do equal justice to the public and to individuals," refused to set aside the verdict. The judgment of the law necessarily follows, unless an error be shewn in the proceedings. None such is seen by us, and we must therefore direct the court below to pronounce sentence of death against the prisoner.

PER CURIAM.—JUDGMENT AFFIRMED.

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The State v. Benjamin Davis.

It is not forbidden by the act of 1796, (*Rev. c.* 452.) for a judge to tell the jury that a witness "had given a fair and candid statement, and appeared to be a creditable man;" the statement being admitted to be correct.

The defendant was indicted for receiving stolen goods, knowing them to be stolen.

On the trial before Martin, Judge, at Pasquotank, on the last circuit, the case stated that "the prosecutor "and owner, who was a respectable citizen, gave a clear "and apparently unimpassioned relation of the circum- "stances affecting the case"—stating in substance, that he had lost his property in March before the trial—that he applied to the defendant for information respecting it, who denied that he had any knowledge of it—that in two or three days thereafter, he found a part of it in the possession of the defendant; and that afterwards, he found the rest of it in the possession of a neighbor of the defendant. This neighbor was examined, and proved, that four or five weeks before the prosecutor claimed the property found in his possession, he had bought it of the defendant.

For the defendant, it was contended that the evidence proved that the defendant stole the property, and not that he received it, knowing it to be stolen—that his being found in possession of it, raised a presumption that he was the thief, and that there was no evidence of a theft having been committed by any body else.

In summing up, his Honor stated "that the prosecu- "tor appeared to have given a very fair and candid "statement—that he seemed to be a creditable man— "but, he added, perhaps I am going too far in speaking "thus of the prosecutor and his testimony; you, gen- "tlemen, are the exclusive judges of such matters. I "have no right to express an opinion upon the facts of "the case, and therefore you will decide entirely for "yourselves, what degree of credit you will give the

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"prosecutor, without being at all influenced by any in-
"advertent remarks of mine."

His Honor left it with the jury to find whether the defendant actually stole the goods, or received them knowing them to be stolen, informing them if they should find that he was the thief, they ought to acquit him.

The defendant was convicted and appealed.

Kinney, for the defendant.

The Attorney General, for the State.

GASTON, Judge, after stating the charge as above, proceeded:—The counsel for the appellant insists that the remarks characterised by the Judge as inadvertent, and which the counsel very candidly admits to have been such, transgressed the bounds imposed on Judges by the act of of 1796, entitled, "An act to secure the impartiality of trial by Jury, and to direct the conduct of Judges in charges to the Petit Jury,"—that whatever effect the immediate correction of this mistake may have produced on the minds of the jury, it was physically impossible, to obliterate from their recollection, what was the Judge's opinion of this testimony—that this opinion was forbidden by the law to be made known to them—that the trial, because of this prohibited communication, was illegal; and that the defendant has therefore a right to require that the verdict, consequent upon such illegal trial, should be set aside.

The act of 1796 enacts "that it shall not be lawful "for a Judge, in delivering a charge to the Petit Jury, "to give an opinion whether a fact has been fully or "sufficiently proved, such matters being the true office "and province of a jury; but it is hereby declared to be "the duty of the judge in such cases, to state in a full "and correct manner the facts given in evidence, and "explain the law arising therefrom." It is obvious that if we confine ourselves to the *words* of this statute, there is no ground for the complaint which we are now considering. But it has been long since settled, that the literal, is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution

the legislative will, this court has fixed its attention upon the purposes declared in the act, and has given to it such a construction as it believed, would most effectually accomplish these purposes. On the one hand, it has been seen, that the Legislature designed to preserve the purity and independence of the trial by jury, by securing to every man, the right to have a decision upon the controverted facts of his case, which shall be the result of the jury's investigation of the evidence, uninfluenced and unbiassed by the opinion of the judge. On the other hand, it has as clearly seen the desire of the Legislature, that every aid and facility should be given to the Jury, by a fair, full and impartial statement of the evidence, and by an explanation of the principles of law therewith connected, to make such investigation correctly, in order to arrive at the true result. It has therefore held, not only that the law may be violated by informing the Jury that a fact is, or is not, *fully* proved, but by giving them to understand on what side the judge believes the weight of evidence to be. But it has also held, that the evidence, of which, the jury is to have a full statement, comprehends not only the words testified, but the circumstances under which they are testified, and that it is within the province, nay. part of the duty of the judge, to present these circumstances to their notice, and fairly to comment upon them as part of "the facts in evidence."—*Reel* v. *Reel*, (2 *Hawk's*, 85.) *State* v. *Moses*, (*ante* 2 *vol. p.* 259.) It has held that the judge has no right to advise the jury upon the weight of the evidence, but that he may point out, and that he ought to point out, the rules of law which may be useful in ascertaining this weight. If he should err in stating these rules, the party grieved has the legal right to except to the error. If there be any departure, in this statement, from fairness and impartiality, it may be a manifestation of opinion upon the controverted facts, as distinctly, as though he had expressed such an opinion.

But, if he bring to the notice of the jury what really is evidence proper for their consideration, if he state the rules of law correctly in relation to this evidence; and

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if in the recapitulation of the facts, there is no departure from fairness and impartiality; it would be absurd for the party to complain of the judge because of the conclusion, which a fair statement of the evidence and the law plainly indicates or may probably induce. The law desires that the truth should be ascertained. It regards the jury, who are the appropriate triers of facts, as having sufficient capacity and integrity to arrive at a correct result upon the disputed facts, without the aid of an opinion from the court, as to that result. But it knows that these triers may be aided, and it wills that they should be aided, by the court summing up for their consideration, the testimony in relation to these facts; including in this summary, the circumstances connected with the testimony—and the rules of law calculated to show their relevancy and application. The task thus alloted to the presiding judge, is confessedly one of great difficulty and delicacy. He is to rescue the case from misrepresentation and misconception of the evidence, and from the false glosses put upon it by ardent and ingenious advocates; he is to present a fair, full and impartial statement of the evidence as applicable to the matter in controversy; he is to collate the testimony of concurring and conflicting witnesses; and indicate these presumptions or legal inferences previously formed on such occasions, and generally found to be accordant with truth —and the more perspicuously and lucidly he discharges these functions, the more faithfully he has performed his duty. But if in doing all this, he intimates his individual opinion, as to the existence, or non-existence of a controverted fact; on which side of the controversy he believes the truth to be; or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he then overleaps the boundary of duty, and invades the peculiar and exclusive province of the jury. It is not strange, therefore, that conscientious minds should, in this situation, be perplexed with unfounded scruples. Such do we consider the scruples, which the learned judge entertained on this occasion: and as he did entertain them, it is impossible not to re-

spect the promptitude and decision, with which he hastened to correct, what he feared, *might* be an error. But this court doth not hold it to be an error. The case stated, which is a part of the record, which we are bound to consider as unquestionably true, and which indeed has been unequivocally admitted to be so, declares that the prosecutor and principal witness was a respectable man. This therefore was a fact in evidence, either expressly proved, or (what is more probable) acknowledged on both sides. He also gave a clear and apparently unimpassioned relation of the circumstances of the case. This was another fact creditable to his candour, his accuracy, and his impartiality. As facts they were proper to be stated to the jury, and ought to have on their minds the influence to which the jury believed them entitled. The judge therefore did not err, but was strictly within the pale of duty in thus bring them before the consideration of the jury.

It is not necessary, but we consider it not inappropriate, to declare the opinion we have formed on the question, whether the judge's correction of the mistake, in case it had been a mistake, removed the defendant's legal right of exception. We are of opinion that there is a precise analogy between the case, in which improper evidence has been incautiously received, or an intimation of opinion, upon a question of fact, inadvertantly given by the Court. So soon as the mistake is discovered, the Judge should specially instruct the jury, wholly to disregard what they ought not to have heard. In either case, if there be reason to believe, that the opinion inadvertantly given, or the testimony improperly admitted, has biassed the minds and perverted the judgment of the triers, a sufficient cause is furnished, addressed to the *discretion* of the Judge, for setting aside the verdict. But without some such reason, the presumption of law is that what the Court has withdrawn from the jury, as unworthy of credit, and wholly improper for, consideration, has in truth been utterly disregarded. Any other presumption cannot be warranted, without disrespect to a tribunal, which the nature of our institu-

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tions proclaims, as having the capacity and probity to decide rightly, where the materials for a correct decision are fairly laid before them. If therefore the judge had inadvertently expressed an opinion which ought to have been withheld, the complete removal of the opinion, removed also the ground of *legal* exception to the trial.

The appellant, by his counsel here, objects to the charge delivered by the Judge. He left it to the jury to say, upon the whole testimony, whether they believed the prisoner had committed an actual theft, upon which belief they were instructed not to convict him; or believed that he had received the goods after they were stolen and with a knowledge of the theft. While the counsel admits the charge to be unexceptionable for what it contains, he insists that it was the duty of the Judge to have gone further, and to have instructed the jury, that the evidence tended to prove the prisoner guilty of actual theft, but not of the receiving of goods stolen by some other person. There are many reasons which forbid our listening to this objection.

In the first place, it ought to appear either that such an instruction was specially prayed for and refused, or at all events, that the case was one, in which there was *no* testimony tending to fix upon the accused the crime charged. The case indeed shews, that the prisoner's counsel argued in his defence to the jury, that if guilty of any offence, it was the offence of stealing, and not of that stated in the indictment; but it does not shew, that an instruction from the court was prayed for, as to any legal presumption arising on the evidence. In the next place, upon the application for a new trial no exception to the want of specific instruction is alleged. We cannot intend therefore that it had been asked and refused. Nor are we at liberty to pronounce, whether the testimony would have warranted such special instruction, because, according to the law of this court, no more of the testimony is to be found on the case stated, than is necessary to present the points distinctly raised upon the record. Circumstances, in themselves and separately not of much weight, might and ought to have great influ-

ence in determining, whether the prisoner was guilty of stealing or receiving stolen goods, very proper to be laid before, and to be considered by those who were to try the facts, but not proper to be inserted, and perhaps wholly overlooked, in a statement intended to present legal errors for the decision of a tribunal, which has no authority to examine into facts.

We are of opinion, that the errors assigned and the objections taken, to the judgment in the Superior Court, are not sustained, and that a certificate to that effect should go to that court accordingly.

PER CURIAM.—JUDGMENT AFFIRMED.

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ACCOUNT.

An account stated in the hand-writing of the defendant does not estop him from showing that the settlement only ascertained the items of the account, and left him at liberty to contest the price at which they were charged. *Moore* v *Watson*, 509

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ALIEN.

1. An Alien cannot take by descent, curtesy, dower or other title, derived merely from the law. *Den on dem. Paul* v *Ward*, 247
2. An Assignment of dower to an Alien, whether voluntarily by the heir, or by the law itself, is null, and will not entitle her to recover in ejectment. *Ibid.* 247

AMENDMENT AND JEOFAIL.

1. The Statute (5 *Geo.* 1 *c.* 13.) for the amendment of writs of error, and for preventing the arresting or reversing of judgments after verdict, is in force in this State. Therefore when the writ was to answer the plaintiff of plea of debt, for $213 32, and the declaration was in debt *qui tam*, for $160. It was held, that the variance was cured by a verdict for the plaintiff. *West* v *Ratledge*, 31
2. The act of 1777, (*Rev. c.* 115, § 35,) incorporates all the statutes of Jeofail and Amendment, including that of 5 Geo. 1. into the legislation of this State, as fully as if they had been renacted.—*Ibid.* 38
3. The omission of the Christian name of a defendant in a warrant, is a fatal defect, and such an one as this Court has no power to supply by amendment.—*Johnston* v *McGinn, et al.* 279
4. A mistake of the Clerk in transcribing a word, may be amended in this Court by comparing the transcript with the original. *Semble* per DANIEL J. *State* v *Seaborn*, 319
5. It is not competent for the Supreme Court to revise amendments made in the Court below; as when a judgment is entered *nunc pro tunc*, it cannot be reversed upon appeal, because it should have been entered at a former term.—*Bright* v *Sugg*, 492

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APPEALS.

1. The Supreme Court is required to inspect the whole record of a case brought up by appeal, and must notice substantial defects in the memorandum of pleadings used in our courts; in these so much must appear as to show with certainty on what point the issue was joined, and the verdict given. *Finley* v *Smith*, 97
2. The act of 1777, (*Rev. c.* 115, § 58,) authorising appeals in questions concerning grants of administration, applies only when by the act of 1715, (*Rev. c.* 10,) the applicant has a vested right to the administration. When the County Court has a discretion in making the grant, as in administrations, *pendente lite*, its judgments are necessarily final, and cannot be reviewed on appeal. *Pratt* v *Kitterell*, 168
3. In an action against two who join in their pleas and against whom, after a joint trial, a joint judgment is rendered, an appeal cannot be allowed at the instance of one defendant only, and if allowed by the County Court, the Superior Court acquires no jurisdiction to try the cause, but is bound on motion of the

Appellee to dismiss the appeal, and award a *procedendo*. *Hicks* v *Gilliam*. 217

APPRENTICE.

1. An indenture of apprenticeship, taken under the Act of 1762 (*Rev. ch.* 68, §19, 20,) but which neither binds the master to teach the apprentice a certain trade, nor to read and write, and which was made by the chairman on behalf of the justices and "their" instead of "his successor," is valid as between the master and one who harbors his absconding apprentice. *Dowd* v *Davis*, 61
2. Every binding of an apprentice under the the Act of 1762, must be by indenture. And every obligation thereby imposed upon the master, which is to be vindicated by an action, must be the subject of express stipulation. *Ibid.* 64
3. But it is otherwise with the payment of the allowance appointed for servants, because the remedy for its non-payment is by petition. *Ibid.* 64
4. An indenture of apprenticeship which does not conform to the Act of 1762, is not absolutely void, but only voidable by the parties to it. *Ibid.* 66
5. Such an indenture as to strangers, creates the relation of master and servant. *Ibid.* 67
6. But the apprentice is not a party to it, and *it seems*, that it can only be avoided by the County Court. *Ibid.* 68
7. And if the apprentice be a party to it, an avoidance of it by him must be by a formal act, with notice of the intent — Neither he nor a stranger can allege an abandonment of the service as an avoidance. *Ibid.* 69

ARSON.

Upon a conviction of Arson, the convict is ousted of his clergy. *State* v *Seaborn*, 305

ASSUMPSIT.

An endorsement of a note &c. is evidence to support a count for money lent or had and received; but is only *prima facie*, and if in fact the endorsement was by a mere agent for one who received the money, it will not sustain such a count against the agent. *Jones* v *Cannady*—87

ATTACHMENT.

1. A non-resident creditor cannot, under the Act of 1777, (*Rev. ch.* 115, § 27,) attach the property of his debtor in this State, when the latter has not absconded nor removed to avoid the ordinary process.—*Broghill* v *Wellborn*, 511
2. Whether a non-resident creditor can attach the property of an absconding debtor resident in this State. Qu. *Ibid.* 511

Vide Certiorari 1, Partnership, 3.

BAIL.

1. *Per* DANIEL Judge, *arguendo*. Bail in this State is special bail to the action, and if the declaration varies from the writ they are discharged, for the same reason that bail to the action is in England.—
2. *West* v *Ratledge*, 41
The Act of 1777, (*Rev. c.* 115 § 69,) makes the Sheriff special bail, when he neglects to return a bail bond, and to charge him as such, no notice to him of his liability is necessary. *Gray et al.* v *Hoover*, 475
3. Bail can take advantage of an omission to issue a *ca. sa.* only by a special plea. *Ibid.* 479

Limitations, Statute of 3.

BANK.

Money received by the Cashier of a Bank on deposit, becomes the property of the Bank, and he is accountable to the latter for it, although it is never repaid to the depositor. *State Bank* v *Locke et al.* 533

Vide Set off, 1, 3.

BEQUEST.

1. Where one put a female slave in the possession of another, and by his will subsequently made, bequeathed that slave to the same person for life, and proceeded, "after her death, I give the same slave and her increase to" &c: *Held*, that issue of the slave born between the date of the will and the death of the testator, did not pass to the legatee for life. *Powell et al.* v *Cook*, 499
2. Where a testatrix gave specific legacies to her sons W. D. and S. and after directing the residue to be divided between them, proceeded: "but in case either "my sons D. or S. die, leaving no lawful issue then living, then my son W. "and the surviving one to have his part "of all that is willed to him, and in case "they should both die, leaving no lawful

"issue then living, then my son W. to "have the whole of what I have willed "unto each of them;" and S. died leaving issue, and then D. died without: *It was held*, 1st. That the specific legacy given him, as well as his share of the residue was subject to the limitation over, and 2d. That W. alone succeeded, as there was no limitation in favor of the issue of S. *Ormond* v *Gibbs*, 504

3. Where a testator by one clause of his will, gave his daughter two slaves absolutely, and by a subsequent clause, gave her another, and proceeded as follows: "which negro, together with those I formerly lent her, at her death, to be divided between her children." *Held*, that parol evidence that the slaves mentioned in the first clause had, before the making of the will, been lent by the testator to his daughter, was admissible, and that fact being established, that the second clause reduced her property in them to an estate for life, with a remainder to her children. *Morton et al.* v *Edwards*, 507

Vide Remainder in Personal Estate, 2.

BILL OF RIGHTS.

Vide Constitution 2, 4.

BILLS AND PROMISSORY NOTES.

1. Promissory notes made out of this State, and payable where made, are within the acts of 1762 and 1786, (*Rev. c.*70 & 284,) rendering certain securities negotiable; and endorsers of them are charged under the act of 1827, c. 2, as sureties, without notice of non-payment by the maker. *Hatcher* v *McMorine*,122

2. The law of the place where a note is payable, determines what is a default by the maker. But the contract of the endorser is regulated by that of the country where the endorsement is made.—*Ibid.* 123

3. Whether the act of 1827 dispenses with that notice which is requisite to charge one who is secondarily liable. Qu. *Ibid.* 127

4. What is reasonable notice to an endorser, depends on the local situation and respective occupation and pursuits of the parties, and is to be judged of by the Court. *Johnston* v *McGinn*, 277

5. Where the parties resided thirty miles apart, the lapse of forty-seven days from the time of the endorsement to the service of notice on the endorser, *held* too long. *Ibid.* 278

5. A Bill drawn in favor of an agent for a debt due to his principal, may be declared on in the name of the principal, and will support an action in his name against the drawer, where the agency was known at the time to the drawer. *Jordan* v *Tarkington*, 357

7. The acceptance of an order is an admission by the acceptor, of having funds of the drawer in his hands. *Ibid.* 358

Vide Assumpsit.

BONDS.

1. A sheriff's bond, executed by an acting Justice of the peace, "to A. B. and the rest of the Justices composing &c." is void. *Dickey et al.* v *Alley et al.* 43

2. An official bond to an officer appointed to take it, vests upon his death or resignation, in his succesors although they are not named in it. *Dowd* v *Davis*, 65

3. Where an administration bond was made payable to A. B. and "*other justices* of Person county," and it appearing that the principal obligor was, at the time of executing it, a justice of said county—held, that such bond was valid, and the words "*other justices*" were to be rejected as senseless and uncertain.—*Vanhook, Cha'n, &c.* v *Barnet et al.* 268

4. A bond not executed pursuant to the provisions of the act of 1825, (*Taylor's Rev. c.* 1276,) though not good as an official, operates as a common law bond. *Ibid.* 270

5. *Delivery* is a question of fact for the decision of the jury, and the circumstances from which it is to be inferred, must be submitted to them. It is error in the court to say what circumstances constitute a delivery. *Ibid.* 270

6. The name of an obligor being omitted in the body of the bond, is no objection to its validity. *Ibid.* 272

7. A guardian bond not taken according to the Act of 1762, (*Rev. c.*69 §7) is nothing but a Common Law bond, payable to the individuals on the bench, and if executed by one of them, is void. *Davis et al.* v *Somerville*, 382

8. An insensible condition to a bond renders it single; but unmeaning words in the condition shall be rejected, so as to

give the obligor the benefit of it. As where a forthcoming bond, dated in April, was for the delivery of property the 15 Friday before May Court, the figures were rejected, and the County Court having a term in May, the delivery was held to be on the Friday before the ensuing term of that Court. *Foster* v *Frost*, 424

9. A condition in the bond of the Cashier of a Bank "to account for, settle and pay over all monies, &c." is tantamount to a condition for "good behaviour; and if it were not, a clause in the charter prescribing the latter condition, is only enabling, and does not preclude the insertion of the former. *State Bank* v *Locke et al.* 529

Vide Ejectment, 1, 3, 4, 5, 6, 7.

BOUNDARY.

1. A call in a grant from a pond or river, "*west up* the river to a *stake*," is in law equivalent to "*with* the river," and the line must pursue the course of the stream. This sense of the word might *possibly* be controlled by a call for a line of marked trees, or a visible and permanent marked corner, and a meaning thereby given to them equivalent to "*up*," not "with the river;" but by no call less certain can they be controlled. *Den on dem. Rogers et al.* v *Mabe*, 180, 194

2. A swamp is a natural boundary, and if a deed calls for one, the course and distance must be disregarded. But in such a call, whether the margin of the swamp or the run of it is intended, is a matter of fact, which is, upon the evidence offerred, to be found by the jury. *Brooks* v *Britt*, 481

BUNCOMBE TURNPIKE COMPANY

Vide Toll.

CA. SA.

Vide Writs, 2, 3.

CASE, ACTION ON THE.

When a house under lease is pulled down by a trespasser, the owner can maintain case for the injury done to the freehold, and is in law entitled to recover damages, the amount of which depends upon the circumstances of the case. *Ott* v *Grice et al.* 477

CASES APPROVED.

1. The State v ———, 1 Hay. 22. Den on dem. Bayard v Singleton, Martin 48. University v Foy, 1 Murph. 58, 2 Hay. 310. Den on dem. Hamilton v Adams, 2 Murph. 161. Doe on dem. Robinson v Barfield, Ibid. 391. Allen v Peden, 2 Car. Law Rep. 638. Hoke v Henderson, 16

2. Hutchins v McLean, Conf. Rep. 116, Dudley v Carmolt, 1 Murph. 339. Foscue v Foscue, 3 Hawks 578. The *dictum* of TAYLOR, C. J. in Stamps v Graves, 4 Hawks 107. West v Ratledge, 39

3. The Justices of Pasquotank v Shannonhouse, ante, 2 vol. 6. The Justices of Cumberland v Armstrong, ante, 3 vol. 284. Dickey v Alley et al. 43

4. Wilson v Forbes, ante, 2 vol. 30. Cowan v Silliman, 46

5. Jones v Sasser, ante, 3 vol. 378. Gregory v Perkins, 51

6. Anonymous, 1 Hay. 146. Dowd v Davis, 66

7. Choate v Wright, ante, 2 vol. 289 — Mushat v Brevard, 77

8. Dunwooddie v Carrington, 2 Car. Law Rep. 46. Ingram v Terry, 2 Hawks, 122. Alston v Foster, 1 Dev. Eq. Rep 327. Jones v Zollicoffer, N. C. Tr. Rep. 213. Yarbrough v Harris, ante, 3 vol. 40. Burnett v Roberts, 83

9. Wilson v Forbes, ante, 2 vol. 30. Dowd v Faucett, 94

10. Bank of Cape Fear v Sewell, ante, 3 vol. 279. Finley v Smith, 98

11. Den v Hill, 1 Hay. 72. Jones v Edmonds, 3 Murph. 43. Green v Johnston, 2 Hawks, 309. Bank of Newbern v Stanly, ante 2 vol 476. Irwin v Sloan, ante 2 vol. 349. Ricks v Blount, 133, 134, 136, 189,

12. Andrews v Mulford, 1 Hay. 320. Grant v Winborn. 2 Hay. 56. Simpson v Blount, ante, 3 vol. 34. Den on dem. Green v Harman, 16

13. McRea v Houston, and Watford v Pitt, 3 Murph. 429, 468. Harris v Yarborough, Adm'r. 16

14. Pipkin v Wynns, ante 2 vol. 402.—Hartsfield v Westbrook, 1 Hay. 258, 6 Smith v Auldridge, 2 Hay. 382. Den on dem, Rogers et al. v Mabe, 18

15. Morgan v McLelland, and Mordecai v Parker, ante 3 vol. 83 & 427. Den on dem. Daniel v Crawford, 19

16. Sharp v Jones & Winborne, 3 Murph. 306. Hicks v Gilliam, 21

17. Anonymous, 1 Hay. 466. McNeil *v* Lewis, N. C. Term. Rep. 80. Den on dem. Fitsrandolph *v* Norman, N. C. T. R. 131. Tate *v* Santhord, 1 Hawks, 46; and Den on dem. Rhem *v* Jackson, ante 2 vol. 188. Graham *v* Houston, 235
18. Briley *v* Cherry, ante 2 vol. 2. Den on dem. Paul *v* Ward, 249
19. Moore *v* Moore, 4 Hawks, 358. Fagan *v* Jacocks, adm'r. 263
20. Justices of Pasquotank *v* Shannonhouse, ante 2 vol. 6. Vanhook, Chairman, &c. *v* Barnett *et al.* 268
21. Threadgill *v* Jennings, ante 3 vol. 384; and McKillan *v* Bowell, 4 Hawks, 34. *Ibid*, 270, 271
22. London *v* Howard, 2 Hay. 332, and Austin *v* Rodman, 1 Hawks, 195.—Johnston *v* McGinn et al. 277
23. West *v* Kittrell, 1 Hawks, 493. Harris *v* Richardson, 279
24. State *v* Kimborough, ante 2 vol. 431. State *v* Lewis, 3 Hawks, 410. State *v* Oldham, 1 Hay. 450; and State *v* McEntire, 2 Car. Law. Rep. 287. State *v* Seaborn, 305
25. State *v* Justices of Lenoir, 4 Hawks, 194. State *v* Commissioners of Halifax, 351
26. King *v* Morrison, ante 2 vol. 341.—Binford *v* Alston *et al.* 853
27. Justices of Currituck *v* Dozier, ante 3 vol 287. Justices *v* Armstrong, *ib.* 284. Justices *v* Shannonhouse, ante 2 vol. 6. Davis *et al.* *v* Somerville, 382
28. Swepson *v* Whitaker, 1 Hay. 224.—Tuton *v* Sheriff of Wake, *ib.* 485. Governor *v* Eastwood, ante 1 vol. 157.—Fitz *v* Hawkins, 2 Hawks, 394. Barker *v* Monroe, 415
29. Carter *v* Sheriff of Halifax, 1 Hawks, 483. Governor *v* Griffin, ante 2 vol. 352. Hodges *v* Armstrong, ante 3 vol. 253; and Sherwood *v* Collier, *ib.* 380. Foster *v* Frost, 424
30. Ward *v* Vickers, 2 Hay. 164. Henry *v* Ballard, 2 Car. Law. Rep. 595. Redmond *et al.* *v* Collins *et al.* 447
31. Spear *v* Gillet, 1 Dev. Eq. cas. 486. Horton *v* Child, 463.
32. Benton *v* Bird, ante 2 vol. 179.—Governor *et al.* *v* Freeman, 474
33. Langdon *v* Tray, 2 Hay. 15. and Arrenton *v* Jourdan, 4 Hawks 98. Gray *et al.* *v* Hoover, 471
34. McRee *v* Alexander, 3 Hawks 322, distinguished from this case and approved. Hoyle *et al.* *v* Logan 497
35. Weaver *v* Crier, ante 1 vol. 327, and Palmer v Clarke, ante 2 vol. 354. Dawson, *v* Shepherd, 498
36. Jones *v* Jones, Conf. Rep. 310. Powell *et al.* *v* Cook, 499
37. Whitaker *v* Whitaker, ante 1 vol. 310 and Granberry *v* Mhoon, *ib.* 456. Pettijohn *Administrator* *v* Beasly, *et al.* 512
38. Den *v* Wilson, ante 2 vol. 306, and Den *v* Hunter, 2 Hay. 401. Den on dem. Barfield *v* Combs *et al.* 518
39. Burford *v* Alston, ante 351, and State Bank *v* Armstrong, ante 519. State Bank *v* Locke, *et al.* 529
40. Den *v* Lacey, 1 Murph. 310, and Stanly *v* Green, 1 Car. Law Rep. 511. Den ex dem. Avery *v* Rose, 559
41. Parker *v* Stephens, 1 Hay. 218. Hogg *v* White. *ib.* 298. Teasdale *v* Branton, 2 Hay. 377. Wellborn *v* Gordon, 1 Murph. 502; and Battle *v* Rorke, ante 1 vol. 228. King, &c. *v* Howard, 583
42. Crow *v* Holland, ante 417; and Hoyle *v* Logan, ante 495. Featherston *v* Mills 596

CASES OVERRULED OR DISAPPROVED.

1. The argument of HENDERSON, J. in Stamps *v* Graves, 4 Hawks, 107, disapproved by DANIEL, J. Also, the case of Harring *v* Glisson, ante 2 vol. 156.—West *v* Ratledge, 39-41
2. State *v* Twitty, 2 Hawks, 248, by DANIEL, J. State *v* Seaborn, 320
3. State *v* Commissioners of Fayetteville, 2 Car. Law Rep. 617, doubted in State *v* Commissioners of Halifax, 351
4. Moore *v* Collins *et al.* ante 3 vol. 126, overruled; and Ridley *v* McGehee, ante 2 vol. 40, doubted. Moore *v* Collins *et al.* 384

CASHIER.

Vide Bank—Bonds, 9.

CATTLE.

Vide Towns, 4, 6.

CAVEAT.

A *caveat* implies that the land is vacant, and the contest is which of the parties shall have the grant. Graham *v* Houston, 235

CERTIORARI.

1. A judgment by default on an attachment before a justice, levied on land, and returned into the County Court for an order of sale, may, after execution issued, be set aside, and a new trial awarded in the Superior Court, upon a writ of *certiorari*, founded on affidavit, showing merits, and denying notice of the proceedings. *Dougan* v *Arnold*, 99
2. In such case, the writ is properly directed to the County Court, and not to the justice granting the judgment, because that Court having possession of the proceedings, can alone answer the writ. *Ibid.* 99
3. The *certiorari*, in this State, lies either to correct errors in law, as a writ of false judgment, or as a substitute for an appeal. *Ibid.* 101
4. It issues, where the party has been improperly deprived of his appeal, as of course; when he has lost the appeal by accident, upon affidavit, showing *prima facie* a case of merit; in the latter case, if on the return of the writ, the merits sworn to, be not answered by affidavits on the other side, the first judgment is set aside, and a new trial had in the Superior Court. *Ibid.* 101
5. In these cases the *certiorari* has the effect of the appeal for which it is substituted, in annulling the judgment, and giving a trial *de novo*, and it may be awarded upon a proper case, so long as the parties alone are interested, but not after third persons acquire an interest; *ex gr.* after a sale under the judgment; there the only remedy is by writ of error, or of false judgment. *Ibid.* 101
6. Where a cause was removed, and the record certified on the removal was erroneously copied, upon advantage being taken of that error in the Supreme Court, the remedy is to move to stay proceedings, until the record of the Court where the trial was had is corrected, and then to bring up that record by *certiorari*. *Den ex dem. Ballard* v. *Carr*, 575
7. The writ of *certiorari* is used in this State, and as a substitute for an appeal. It never has been allowed in lieu of a writ of error. The latter writ being entirely efficacious for five years, there is no need of the former during that period, and after its expiration, the *certiorari* being discretionary should not be granted, as thereby the limitation to writs of error would be avoided. *Swain* v *Fentress*, 601
8. The opinion of Counsel as to the probable issue of a suit, does not justify a party in neglecting to appeal. *Ibid.* 603

CLERGY, BENEFIT OF.

Vide Arson.

CLERKS.

1. A clerk appointed under the Act of 1806 (*Rev. ch.* 693) has an estate in his office, and although the Legislature may destroy the office, and by consequence the estate in it, yet the Act of 1832, which continues the office, but transfers the estate in it to another, is unconstitutional and void. *Hoke* v *Henderson*, 1
2. The act of 1832 does not modify the tenure of the office of clerk. Neither does it affect the interest of the incumbents; but leaving the office and its privilege untouched, it directs the courts to remove one class of individuals without a trial, and induct another, it is then judicial in its character and effects. *Ib.* 14

COLOUR OF TITLE.

Where A purchases under an execution against B, takes a deed, and on the same day conveys to B, though the purchase and conveyance be at the request of B, and merely to give him a colour of title, without any money paid or received—the conveyance to B is a sufficient colorable title within the statute of limitations.—Den on dem. *Rogers et al.* v *Mabe*, 180

It seems that a Sheriff's deed gives by relation, color of title from the sale. *Ibid*, 180

Colour of title depends not on the purpose of taking a deed, but on its apparently conferring an estate on the possessor of the land. *Ibid*, 195

CONSTITUTION.

1. It is competent for the Judiciary to declare an Act of Assembly to be unconstitutional and void. But *prima facie*, every act of the Legislature is within its authority, and is to be declared unconstitutioual only in cases where no doubt exists. *Hoke* v *Henderson*, 7-8
2. The 4th section of the Bill of Rights, declaring that the Legislative, Executive

and Judicial powers ought to be distinct, deprives the Legislature of all Judicial power. *Ibid.* 12-13

3. A determination of conflicting rights between two classes of persons is a judicial act, although pronounced in the form of a statute. Neither does the generality of its terms affect its character. *Ibid.* 13

4. A legislative act which deprives one person of a right, and vests it in another, is not a "law of the land," within the meaning of the Bill of Rights. Neither is one which professes to punish the citizen or to deprive him of his property without a trial, according to the course of the common law. *Ibid.* 15

CONTRACTS.

1. On a contract to deliver specific articles at a certain place, within a certain period, it not appearing that any *act* was to be done by the plaintiff to entitle him to recover for a breach of such contract, it is not necessary for him to prove that he was present at the place during the time appointed. *Cowper* v *Saunders*, 283

2. When *concurrent acts* are to be done, as the one party to deliver specific articles, on receiving the price, and the other to pay on receiving the articles, neither can sue the other for non-performance, without showing a performance or readiness to perform. *Ibid.* 285

3. Where a party is to deliver specific articles on or before a given day, if he intend to deliver before the last day, he must give reasonable notice of his intention to the other. *Ibid.* 285

3. Where A transferred to B a note for $900 to secure the payment of $600, and it was agreed if the $600 was not refunded within three months, the note should be the absolute property of B; such contract, if intended as an absolute sale, is not void for the excess, for want of consideration; but whether intended as an absolute sale, or a pledge only, should be left to the jury. *Alexander* v *Smith*, 364

5. The interest of A, in such a contract, is not negotiable, and his assignee cannot support an action at law, against B. in his own name, without an express promise. *Ibid.* 364

5. The sickness and consequent absence of a party is no excuse for non-performance of his contract. *Ibid.* 367

CONTRADICTORY DECLARATIONS.

Vide Evidence, 19.

COSTS.

1. Costs in the Supreme Court are in the discretion of the Court. The appellant is not entitled to recover them as of right, upon a reversal of the judgment below, but may be adjudged even to pay them under circumstances. *Hicks* v *Gilliam*, 217

2. Executors, when they are defendants, have generally no privilege as to costs, and are subjected to them, unless some plea to the whole action be found in their favor. And where upon *plene administravit*, the defendant was fixed with assets, as to the part of the plaintiff's demand, the latter recovers his costs.—King, *Chairman &c.* v *Howard*, 581

Vide Executors and Administrators, 8

COURTS.

1. In Courts of supreme, original criminal jurisdiction, every thing as to the method of proceeding is presumed and taken to be right, unless the contrary appears. *State* v *Seaborn*, 305

2. Notice is judicially taken of the time when the County and Superior Courts commence. *Foster* v *Frost*, 427

COVENANT.

1. In an action of covenant for uncertain damages, no set-off, or a claim in nature of a set-off, can be allowed; and hence, in an action against a lessee for breach of his covenant to build a mill within the term, *held* that he was not entitled to show in mitigation of damages the building of the mill after the term, more especially when he had held over and put his lessor to bring ejectment against him—pending which the mill was built. *Dowd* v *Faucett*, 92

2. *It seems* that a part performance of the covenant, during the term, is an answer to the damages *pro tanto*. *Ibid.* 93

Vide Warranty, 1, 2, 3.

DAMAGES.

Damages are not recoverable in debt, upon a penal statute, and where they were as-

sessed by the jury, the judgment as to them was reversed at the costs of the plaintiff. *West* v *Ratledge*, 42

Vide Case, Action on the—Covenant, 1, 2—Mesne Profits—Trover, 4—Warranty, 2.

DEBT UPON A PAROL STATUTE.

Vide Damages.

DECLARATION.

Vide Usury, 2.

DEED.

1. A deed is evidence of its own existence, against all the world, and of course, of every thing which necessarily results from its existence; but of the truth of the matters recited, acknowledged, or declared therein, it is evidence only against parties and their privies. *Claywell* v *McGimpsey*, 89
2. In construing an informal deed conveying to A, a negro woman and her issue, except two children, which were given to B, and continuing as follows: "I also give to my daughter B a negro man, named &c. to her and her &c. after my death, to hold all the said &c. to them the said A and B, their heirs &c. henceforth as their property absolutely, without any manner of condition"—*it was held* that the reservation of the life interest applied only to the negro man given to B, notwithstanding the addition of a clause, that if A should die without issue, the property should revert to the donor. *Branch* v *Byrd*, 142
3. The appointment of a guardian to the donor does not give a testamentary character to a deed of gift. Neither does the reservation to the donor of a life interest in a slave. *Ibid.* 144
4. If the description in a deed be so vague or contradictory that it cannot be ascertained what thing in particular is meant, the deed is void. But different descriptions will be reconciled if possible; or if irreconcilable, yet if one of them point out the thing intended with certainty, a false or mistaken reference to another particular shall not avoid it. *Den on dem. Proctor* v *Pool*, 370
5. No positive rule can be laid down for ascertaining the intention of the maker of a deed, or other instrument But his intention is to be collected from the whole instrument taken together. *Ibid.* 373
6. Where the description in a deed is by several particulars, and distinct things are found answering to each particular, Qu? Whether the deed be inoperative for uncertainty, or do all things, answering to the several particulars, pass by it. *Ibid.* 374
7. *Quantity* is not generally descriptive, but it may be so—as if one own two lots, one of half an acre, the other of an acre, and grant his "acre lot," the larger lot will pass, though a few feet more or less than an acre. *Ibid.* 375
8. Where a bargainor having signed and sealed a deed, said to the attesting witness, "I acknowledge that to be my act and deed," *it was held*, that these words, being addressed to one who was not intended to take possession of the deed, did not amount to a delivery. *Moore* v *Collins et al.* 384
9. And where after the deed was thus executed, the agent of the bargainee offered to take it and carry it to him, he being out of town, but the bargainor objected, saying it might thereby be lost, and that he expected the bargainee back that night, and would himself hand it to him: *it was held*, that this refusal of the bargainor to part with the custody destroyed the effect of his antecedent words. *Ibid.* 384
10. *Held also*, that the jury could not infer from the facts above stated, a delivery at the time of the bargainee's return, but only at the time when the deed was proven to be in his possession. *Ibid.* 384
11. Whether an instrument be a deed or not, is a question for the court; but whether it has or has not been cancelled, is for the jury. *Horton* v *Child*, 461

Vide Evidence, 9, 10, 13—Land sold for Taxes, 1, 3.

DEEDS IN TRUST.

1. An absolute deed with a parol proviso for redemption, is not avoided by the act of 1820, (*Rev. Ch.* 1037) for want of registration within six months, as that statute applies only to deeds which are on their faces securities. *Gregory* v *Perkins*, 51
2. Where a deed of trust was duly proved, but because of the sickness and death of

the Register, was not registered within six months, but was registered as soon as a successor was appointed, it is void as to the creditors of the bargainor.—*Moore* v *Collins et al.* 384

DELIVERY.

Vide Bonds 5, Deed 8, 9, 10, Ejectment 7.

DEPOSITION.

1. Where a notice specifies that a deposition will be taken between certain hours of the day, the deposition cannot be read unless it appears to have been taken between the hours specified. *Harris* v *Yarborough, Adm'r.* 166
2. A party offering the deposition of a witness examined in the cause, for the purpose of contradicting him, will not be permitted to read part only of the deposition, but if he introduce it, must read the whole. *Burton* v *Morphis,* 242
3. The deposition of a woman far advanced in pregnancy, and who, it was proved on the trial, had probably just been delivered, comes within the spirit of the act of 1803, (*Rev.c* 633) and is admissible. *Ibid.* 244
4. A commission directing the taking of a deposition to be read on the trial of a suit pending in the Superior Court of Law and Equity, is valid. *Armstrong, Cha'n. &c.* v *Dalton, Ex'r.* 571

DESCENT.

Vide Legitimation 1, 2.

DEVISE.

1. C by his will devises certain lands and slaves to his son R; he then devises other lands and property to be sold on a credit of one, two and three years, and all the residue of his estate (not otherwise disposed of) to be sold on a credit of twelve months, "lands rented and negroes hired, except R's lot of land and negroes, the possession of which I wish him to have at my death." He then directs the money arising from the sale, rent, hire, &c. to be applied to the settlement of his estate, &c. Held, that on the construction of the whole will, R's share was not exempted from the payment of debts, on a deficiency of the fund appropriated to that purpose by the testator. *Westbrook et al. Ex'rs.* v *Croom,* 250
2. A devise of lands to A for life, and after her death to be equally divided among the male or female heirs begotten of her body, and for want of such heirs then over, gives A an estate tail in the land, which by the act of 1784 (*Rev. c.* 204) is converted into a fee. *Doe on dem Ross* v *Toms,* 376
3. When there is a particular and also a general paramount intent apparent in the same will, and they clash, the general intent must prevail. *Ibid.* 381
4. Where a devisor gave a tract of land to A, excepting two acres which he devised to B, and before a severance of the latter, A purchased them from B, and held the whole together during his life as one estate, and by his will devised it as "the land whereon I now live," the whole passes thereby, although further described as of the quantity it would have contained, had there been an actual severance. *Den on dem. Dodson et al.* v *Green,* 488
5. The number of acres in a tract of land is never, unless plainly so intended, a matter of description. *Ibid.* 491

DOWER.

Vide Alien 2, Estoppel 3.

EJECTMENT.

1. A person entering into the possession of lands, under a voluntary parol agreement to convey, no rent being reserved, is not a tenant from year to year, and is not entitled to notice to quit. But there must be some act, as a demand of possession by the one party, or a refusal to deliver by the other, to convert the defendant into a trespasser, before an action can be maintained against him. *Den on dem. Carson* v *Baker,* 220
2. On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessors of the plaintiff must at their peril take out a writ of possession only for land to which they have title. *Den on dem. Godfrey et al.* v *Cartwright,* 487
3. A bond given by one who applies to be

made defendant in an ejectment, with a condition to be void if he shall pay all costs which may be adjudged against him, does not comply with the requisitions of the act of 1804, (*Rev. c.* 658) and a *sci. fa.* cannot be brought on it as a bail bond. But it is valid as a bond at common law, and will sustain an action of debt. *Ricks* v *Hayworth*, 584

4. The bond of a person seeking to defend an ejectment may be made to the lessor of the plaintiff. *Ibid.* 587

5. That bond is in all respects similar to bail bonds required by the act of 1777, (*Rev. c.* 115, § 16, 17) except that it is not made to the Sheriff, and does not require the defendant to enter his appearance. *Ibid.* 588

6. *It seems* that it should be made to the nominal plaintiff. *Ibid.* 588

7. Its delivery may be inferred from proof of its being signed, sealed and deposited in the office of the Court where the action is pending. *Ibid.* 591

ELEGIT.

Vide Execution 2, 5, 7.

ENTRY.

1. An entry of land is a mere equity to demand a grant upon payment of the purchase money in due time, and is not noticed at law, except in cases of *caveats* under the act of 1777 (*Rev. c.* 114.)—*Featherston* v *Mills*, 598

2. And upon a proper case, one who first enters land has relief in equity against another who obtains a grant for it, with notice of the entry. *Ibid.* 599

Vide Trespass 2, 3.

EQUITABLE INTERESTS.

Vide Execution 15, 16.

ERRORS AND DEFECTS CURED.

1. On an appeal from the judgement of a justice of the peace, after a plea in the County Court, the defendant cannot object to any irregularity which took place before the justice, as that the judgment was rendered after the return day of the warrant. *Arnold* v *Shepherd*, 49

2. A miscontinuance before a justice of the peace cannot be taken advantage of by the defendant, after he has appealed and pleaded to the cause in the court above. *Shipman* v *Mears*, 486

ESTOPPEL.

1. Whether the estoppel upon tenant and bailee to deny the title of the landlord or bailor, applies in any case, but in an action to recover the possession of the thing, and possession only, as *detinue* and *ejectment*. Qu! But it is clear that one who has received property as the agent of another, to which he discovers that he has a title cast upon him by the law for the benefit of others, is under no estoppel in an action of trover to recover the value of the property. *Burnett* v *Roberts*, 84-85

2. This species of estoppel is founded on good faith, and ought not to apply to any case where it will work injustice.—*Ibid.* 85

3. The judgment for dower is no estoppel to creditors. *Den on dem. Paul* v *Ward*, 249

EVIDENCE.

1. Where a defendant gives evidence of a part of a transaction in his defence, he cannot complain if the Court permits the plaintiff to show the whole, whether the transaction be strictly relevant or not.—*Cabiness* v *Martin et al.* 106

2. Where a common design is proved as to several persons, the act of one in the execution of it is the act of all, and so is his declaration accompanying and explaining the act. *Ibid.* 110

3. Where a private act requires the assent of a particular person to its validity, parol evidence of that assent may be given. But evidence that a person procured one to be passed, or subsequently assented to it, is not admissible to extend its effect, as where a bastard was legitimated, without saying to whom—evidence that the putative father procured the passage of the act, does not legitimate the bastard as to him. *Drake et al.* v *Drake et al.* 117

4. One tenant in common cannot in an action against his co-tenant, be examined as a witness to defend his possession.—*Den on dem. Rogers et al.* v *Mabe*, 180

5. Competency of one tenant in common

as a witness for his co-tenant, stated by RUFFIN, C. J. *Ibid.* 196

6. A widow who dissented from her husband's will, and had her dower and share of personal estate allotted to her, as in case of an intestacy, is a competent witness to prove declarations made to her by her husband in his life time, as to the *factum* of a paper offered, as his will, on an issue of *devisavit vel non*, to which she is no party. *Hester* v *Hester et al.* 228

7. The rule upon the subject of confidential communications is not denied, but does not apply to such as are made to the wife with a view of being by her communicated to others, nor to such as are made as to a matter of fact to be operated upon *after* his death, where it must be the wish of the husband that such operation should be according to the truth of the fact, as established by his declaration. *Ibid.* 231

8. The record of a judgment against an administrator is not *prima facie* evidence of assets in the hands of the administrator, in a suit brought by the plaintiff in the original suit, on the administration bond, against the administrator and his sureties. *Vanhook, Cha'n. &c.* v *Barnett et al.* 271

9. The recital of a former in a subsequent deed is evidence of the existence of the former deed, against a party to the latter and all claiming under him, but not against a stranger. *Hayath et al.* v *Phifer,* 273

10. But when the admission contained in the recital is relied by a stranger for a fact operating in his favor, and there are also other facts disclosed which operate against him, the recital must be taken altogether. *Ibid.* 273

11. A return on an execution by a sheriff, of a private matter between himself and the plaintiff in the execution, *e. g.* "payment to the plaintiff," or "indulgence by him," is no evidence for the sheriff in a suit brought against him by the plaintiff in the execution. *Bank of Newbern* v *Pullen,* 297

12. But between third persons, such return is evidence. *Ibid.* 297

13. In debt on bond, where the defendant offers a deed to the plaintiff in evidence, and relies on the consideration money therein expressed to be paid, as evidence of payment or satisfaction of the bond, it is competent for the plaintiff to prove that notwithstanding the deed purported to be made for valuable consideration, none was given or contemplated, but that a gift of the property conveyed was intended. *Johnson* v *Taylor,* 355

14. In a suit brought by a sheriff against his collector for arrearages of taxes, a settlement between the sheriff and the accounting officer for the county, is not evidence for him. *Ballenger* v *Allen,* 358

15. To prove a misdescription in a license to a coasting vessel, the license itself should be produced—a mistake in that part of the enrolment which recites a description contained in a former enrolment is not evidence of a similar mistake in the license. *Felton* v *McDonald,* 406

16. Whenever a conversation between two persons is proper evidence in action against others, it may be proved by either or both of the parties between whom it took place, as where A communicated to B, a statement made to him by C, and upon his examination could not recollect its substance, C is a competent witness to prove it. *Green* v *Cawthorn,* 409

17. In action for an assault and battery, all the circumstances accompanying the transaction are admissible in mitigation of damages; but it is otherwise of words spoken by either party, at a different time. *Ibid.* 411

18. A conveyance by a stranger to the defendant, to indemnify him against loss, by reason of the action, is admissible against him, especially if it recites facts material to the issue, being similar to a declaration made in his presence, and not contradicted. *Foster* v *Frost,* 428

19. Where upon the trial of an indictment for arson, the evidence was that the prisoner had in his possession bank notes

similar to some stolen from the house where the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them, an instruction to the jury, that these contradictions were evidence to prove that he did not come honestly by them, is not erroneous; and these declarations lead to prove the guilt of the prisoner. *State* v *Gillis*, 606

Vide Deed 1, Wills 26, 27.

EXECUTION.

1. Where a judgment was obtained against an infant heir by *sci. fa.* under the act of 1789, (*Rev. c.* 311,) with a stay of execution for one year, during which another creditor commenced suit, and obtained judgment against the heir on a bond of his ancestor, and issued a *fi. fa.* before the expiration of the stay: *it was held*, that a purchaser under it had a better title than one under a *fi. fa.* afterwards issued upon the first judgment.—*Doe on dem. Ricks* v. *Blount*, 128
2. At common law, a judgment is an absolute lien upon land, so long as an *elegit* can issue upon it, and that writ displaces all alienation posterior to the judgment including extents under junior judgments. *Ibid.* 131
3. But the rule as to chattels is different, they are bound only from the *teste* of the *fi. fa.* And the *fi. fa.* first executed has the preference. *Ibid.* 131
4. As to the heir and purchasers under him the real assets are bound by process against the former. *Ibid.* 132
5. But as to the purchaser under judgments in all respects junior to the process thus issued, the rule ought to be different.—For an *elegit* in displacing an extent made under a junior judgment, does nothing but postpone the satisfaction of the latter. *Ibid.* 132
6. But it is otherwise if the title of a purchaser under a *fi. fa.* upon a junior judgment is divested by a sale under an elder. *Ibid.* 132
7. From the case of *Den* v. Hill, (1 *Hay.* 72,) and from the necessity of protecting sales of land under *fi. fa.* it seems clear that an extent will not in this State, divest the title of a purchaser under a junior judgment. And if so it follows necessarily that the Statute 5 Geo II, subjecting land to sale under a *fi. fa.* abolished the execution by *elegit*. *Ibid.* 133
8. In this State, the rules of the common law as to the lien of a *fi. fa.* upon chattels, has been extended to land when sought to be subjected by that writ.—*Ibid.* 134
9. And after the sale of land under one *fi. fa.* the lien of another is regarded only in questions as to the application of the money raised by the sheriff. In all cases the title of the purchaser is protected. *Ibid.* 134
10. And he is protected as well when the writ is against the real assets in the hands of the heir, as where the defendant in it is the original debtor. *Ibid.* 135
11. The opinion of HENDERSON, C. J. that the *proviso* to the last section of the act of 1789, whereby executions against infant heirs are stayed, applies only where the guardian has sold property of the infant to pay the debt, is probably correct. But at all events, that *proviso* extends only to judgment upon a *sci. fa.* not to those in debt upon the bond of the ancestor. *Ibid*, 137
12. Nothing but a writ in debt, or a *sci. fa.* is "an action brought or process sued" within the act of 1789, to restrain alienation by an heir. *Ibid.* 138
13. In this State the first execution finally acted on protects both the purchaser under it and the plaintiff in it. *Ibid.* 139
14. Process against an heir creates a lien upon the real assets only as to him and purchasers under him—not as to other creditors. *Ibid.* 140
15. Slaves held by a trustee, in trust to be divided among the children of A, who may now be living, and those who represent any deceased child in the proportion and after the same manner as if they were claiming the said slaves as next of kin of their father, are not liable to attachment or execution, at the instance of a creditor of one of the *cestui que trusts*. *Gillis* v *McKay*, 172

16. Per RUFFIN, C. J. *arguendo*. The act of 1812 (*Rev. c.* 830) subjecting equitable interests to sale by execution, does not authorise a sale of the interest of one of several joint owners of a chattel. *Ibid*, 177

17. A *fi. fa.* issued upon a dormant judgment is not void, and the sheriff is bound to obey it. *Dawson* v *Shepherd*, 497

Vide Sheriff's Sale.

EXECUTORS AND ADMINISTRATORS.

1. A judgment *quando* does not alter the dignity of a debt, nor fix the defendant with assets; and as to a *sci. fa.* upon it, he may show that he has paid subsequent assets to debts of higher dignity, it follows that payment of a judgment *quando* upon a simple contract debt, after notice of an outstanding bond, does not protect the executor against the latter. *Roundtree* v *Sawyer, adm'r.* 44

2. A debt due an administrator by his intestate, is, in law paid, the instant assets applicable to it are received, and nothing *ex post facto* will set it up again; as where an an administrator was the obligee of a bond executed by his intestate and another, it was held to be satisfied by the receipt of assets rightfully applicable to it, although the obligee was afterwards compelled to pay other bond debts of his intestate, to which he was surety. *Chaffin* v *Haynes et al.* 103

3. Whether an obligee administering upon the estate of one of several obligors, destroys his remedy as to the others. Qu? *Ibid.* 103

4. It seems that the act of 1829 c 22, giving a surety who has paid the debt of a decedent, a claim against his estate equal in dignity to that of the principal creditor, does not enable him where he is both surety and administrator, to prefer a claim as surety to one payable directly to himself. *Ibid.* 105

5. The giving of a bond by an administrator is not a condition precedent to his appointment. Where it appeared from the records of the Court, that A B was appointed administrator and qualified as such, though a blank bond was signed by him and his securities, the acts of such administrator were held valid, until his letters were called in and revoked. *Spencer, adm'r.* v *Cahoon*, 225

6. The fourth section of the act of 1789, (*Rev. c.* 308) barring creditors of a decedent, who do not bring their actions within two years after the qualification of the executor and administrator, is a defence as well to the next of kin as the personal representative, and the latter in pleading it, need not aver that he has delivered the assets to the former, and taken refunding bonds. *Goodman, adm'r.* v *Smith, adm'r.* 450

7. Advertisements required before the act of 1806, establishiug Superior Courts in each county, to be made at the district Court-houses, may now be made at the County Court-houses. *Ibid*, 458

8. A plea of an outstanding bond, and *no assets ultra*, is no defence to an action of *assumpsit* for rent due upon a parol demise, the latter being of equal dignity with the former. *Hubbell et al.* v *Thurston, adm'r.* 502

9. Upon *plene administravit*, the defendant is allowed the costs of an action brought against him in his own right, for a conversion of chattels, which he *bona fide* thought were of the assets of the decedent. *Leigh* v *Lockwood adm'r.* 577

Vide Appeal 2, Bond 2, Cost 2, Evidence 8.

FALSE JUDGMENT, WRIT OF.

Vide Certiorari, 3, 5, 7.

FEME COVERT, DEED OF.

Vide Husband and Wife, 6, 7.

FRAUD.

1. A deed absolute on its face, but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. *Gregory* v. *Perkins*, 50

2. What is fraud in law, and when the fact of fraud must be left to the jury, and the effect of the vendor's retaining the possession, discussed by RUFFIN, C. J. *Ibid.* 53

3. An absolute deed with a parol proviso for redemption is void under the act of 1820, without reference to its registration; because it is an evasion of that act, by which publicity was intended to be given to all conveyances which are securities. *Ibid.* 55
4. Indebtedness at the time of making a voluntary conveyance of part only of the grantor's property is, in respect to *subsequent* creditors seeking satisfaction of the property conveyed, only evidence of fraud, the consideration of which belongs to the jury; but in respect to *prior* creditors whose debts can be otherwise satisfied, it constitutes fraud in law, to be declared by the court *Den on dem. O'Daniel v Crawford,* 197
5. A voluntary conveyance will never be upheld to defeat a *prior* creditor, whatever be the amount of his demand; although the grantor reserve property amply sufficient to satisfy the debt, and the necessity of resorting to that conveyed, arise from the wasting of that reserved, many years after the conveyance. *Ibid.* 197
6. Nor is there any exception from these principles in favor of dispositions made by parents in advancement of children; the principle is universal in its application, that the voluntary conveyance yields to the *prior* debt so far as it is necessary to its satisfaction. *Ibid.* 197
7. The functions of the Court and jury in questions of fraud considered and distinguished, and the cases of *Morgan* v *McLelland,* and *Mordecai* v *Parker,* (*ante* 3 *vol. p.* 83 and 427,) and the cases in which this Court held the retaining of possession by a vendor, but evidence to be left to the jury, and not a fact *per se* establishing fraud in law, referred to and affirmed. *Ibid.* 197
8. Distinction as to equitable relief, between cases of *actual* fraud, and fraud presumed only from the conveyance being voluntary; in the former equity relieves; in the latter the creditor is left to his legal remedy. *Ibid.* 203

FRAUDS, STATUTE OF.

A promise by A, to pay the debt of a third person, on his being discharged from custody, is not within the act of 1826, *c* 10, there being a *new* and *original* consideration moving between the parties. *Cooper* v *Chambers,* 261
Vide Sheriff's Sale, Slaves, gift or sale of, 2, 3, 4, 6.

FREE PERSONS OF COLOR.

Vide Slaves, carrying away or concealing of, 2.

GIFT.

Vide Slaves, gift or sale of, 1, 7, 8.

GRANT.

A grant can only be repealed at the suit of the State, or of a prior grantee. *Crow* v *Holland et al.* 417
Vide Scire facias 3, 4, 6.

GUARDIAN.

1. A guardian appointed by a Court of Chancery may, by order of the Court, rightfully sell the personal property of his ward. And the act of 1762 (*Rev. c.* 69) confers the same powers on the County Courts in this State. *Harris* v *Richardson,* 279
2. The appointment of guardian is matter of discretion, the exercise of which cannot be revised by this Court. *Bath* v *Vick,* 284
Vide Bonds 7.

HALIFAX, TOWN OF.

Vide Towns 1.

HEIR.

Vide Execution 1, 4, 5, 10, 11, 12, 14.

HUSBAND AND WIFE.

1. *It seems,* that at law the husband's assignment will pass every expectant interest of the wife, which would be legally transferable, were it an interest of his own, unless it is so limited that it cannot by possibility vest in possession during the coverture. But at all events an assignment of the husband, if not binding on the wife surviving, while the interest continues expectant, is certainly valid as a conveyance, when the interest falls into possession during coverture. *Burnett* v *Roberts,* 84
2. The husband of a female *cestui que trust* has no right to recover the interest

of his wife without joining her. *Gillis* v *McKay*, 172

3. A bequest of a slave to a *feme covert*, "*for her proper use*," does not vest in her a separate and exclusive right; but the legacy, if assented by the executor, goes to the husband. *Gilliam, ad'mr.* v *Welch, adm'r.* 286

4. The Court will not force a construction to give a legacy to the separate use of the wife. *Ibid.* 289

5. Slaves of an infant *feme*, held in common with others, pass to her husband, *jure marito*, although they were hired out by her guardian before the marriage and the husband died during the term. *Pettijohn, adm'r.* v *Beasley et al.* 512

6. The deed of a *feme covert* does not bind her, when her private examination was taken under a commission by one commissioner only, and when she was neither a resident of another county, aged nor infirm. *Den ex dem. Barfield* v *Combs et al.* 514

7. The acts of 1715 and 1751 (*Rev. c.* 3 & 50) construed by DANIEL, Judge — *Ibid.* 514

Vide Evidence 7.

INDENTURE.

Vide Apprentice.

INDICTMENT.

Vide Religious Congregation—Slaves, carrying away or concealing of, 1, 2.—Towns, 2, 3.

JOINT TENANTS.

Vide Execution, 16. Partnership 2, 4.—Pleas and Pleading, 1.

JUDGE'S CHARGE.

1. When the plaintiff prays proper instruction as to the title of the defendant, which is refused, a new trial will be granted, although if the defendant had prayed proper instruction as to the plaintiff, the judgment would have been correct. *Walton* v *Stallings*, 57

2. Where general instructions are given to a jury, that upon the whole case, as appearing upon the evidence, the plaintiff is entitled to recover; if there be any defect in the title of the plaintiff upon any ground, the instruction is erroneous. *Den. on dem. Paul* v *Ward* 247

3. When a judge undertakes to decide on facts and inferences which ought properly to be left to the jury, the judgment will be reversed and a new trial awarded. *White, Adm'r.* v *White*, 257

4. When a Judge decides upon a question as being one of *law*, where it is really one of *fact*, and should be submitted to a jury, it is competent for him afterwards to correct his mistake, and submit the matter to the proper tribunal.—*State* v *May*, 328

5. It is not forbidden by the act of 1796, (*Rev. c.* 452) for a Judge to tell the jury that a witness "had given a fair and candid statement, and appeared to be a creditable man," the statement being admitted to be correct. *State* v *Davis*, 612

JUDGMENT.

1. In this State, when no judgment is formally entered upon a verdict, connected with the pleadings, which authorises a judgment, the Court is bound to intend such a judgment as ought to have been rendered. *Doe on dem. Barnard* v *Etheridge*, 295

2. The Supreme Court is bound to render such judgment as upon the inspection of the whole record, ought to have been rendered in the Court below. *Binford* v *Alston et al.* 353

3. An advance of money made by a stranger for a judgment, upon an assignment of it to him, is not a satisfation of it.—*Forster* v *Frost*, 429

Vide Execution 2, 3, 17.

JUDGMENT QUANDO.

Vide Executors and Administrators 1.

JURISDICTION.

The agreement of parties cannot bestow on a Court an authority to decide a case on any other principles than those prescribed by law for its decision. *Pagan* v *Jacocks, adm'r.* 264

JURY AND JURORS.

1. A statement in the record that "on balloting the following jurors are duly elected, sworn and charged to serve as grand jurors," &c. is a sufficient compliance with the provisions of the act of 1779

(*Rev. c* 157) *State* v *Seaborn*, 305
2. An irregularity in the mode of impannelling a grand jury, can only be taken advantage of by plea in abatement upon the arraignment, and the objection comes too late after verdict. *Ibid* 305

JUSTICES' JURISDICTION.

1. The expression "liquidated accounts," used in the act of 1826 *c* 12, as explained by the act of 1829 *c* 32, means "signed accounts," and therefore, where A and B were partners in trade, and A gave his own promissory note for a debt of the firm, and B wrote a letter to A, stating that he would pay the debt to the creditor, it was held that the account was not thereby *liquidated* against B so as to give exclusive jurisdiction of the demand to a single magistrate, although the note was given, letter written and action brought before the act of 1829. *Wilson & Conner* v *Jennings*, 90
2. An account offered upon the trial of a warrant, for a sum exceeding sixty dollars, stated to be "due by account," must be signed. *McFarland* v *Nixon et al.* 141
3. A promise by A, to pay the debt of a third person, on his being discharged from custody, though the debt be payable "in trade," is within the jurisdiction of a single magistrate. *Cooper* v *Chambers*, 261
4. The act of 1820 (*Rev. c* 1045) and of 1829 c 32, do not give justices of the peace jurisdiction beyond sixty dollars, except when the debt is secured by a bond or note, or a liquidated account, and an attachment founded upon two former judgments, for a sum exceeding that amount, is void, and is not a justification to an officer acting under it.—*Bryan* v *Washington et al.* 479

JUSTICES.

A justice of the peace may, under the act of 1803, (*Rev. c.* 627, §. 3,) postpone a cause pending before him, for thirty days, excluding Sundays. *Shipman* v *Mears*. 484

LAND SOLD FOR TAXES.

1. The requisition of the act of 1789, (*Rev. c.* 492,) amending the Revenue laws, as respects the land tax, must be strictly complied with by the sheriff, or the estate of the owner is not divested, and where land was, under the fourth section of the act, stricken off to the Governor, and the sheriff, instead of executing his deed, at the County Court succeeding the sale, as the act requires, did it at a subsequent term, the deed is inoperative. *Den ex dem. Avery* v *Rose*, 549
2. In this State, sales of land for taxes are *quasi* sales under process of execution, and are governed by rules analogous to those regulating sales under *fi. fas.*—*Ibid.* 555
3. Where the sheriff has no authority to sell, or where his deed shows that he has exceeded his power, no title passes to the purchaser. *Ibid.* 556

LEGACY.

If a legatee takes possession of property, claiming it under the will, and retains the possession of it for many years; this is evidence which will warrant the presumption of an assent to the legacy by the executor. *White, Adm'r.* v *White*, 259

Vide Husband and Wife, 3, 4.

LEGISLATURE.

Vide Constitution, 1, 2, 4. Office, 2, 3, 5.

LEGITIMATION.

1. Where the putative father of a bastard procured the passing of a private act of the Assembly, whereby the name of the latter was changed to that of the former, and he was declared "forever hereafter to be legitimated, and made capable to possess, inherit, and enjoy by descent, &c. any estate, real or personal, to all intents and purposes, as if he had been born in lawful wedlock"—it was held, that as the bastard was not made legitimate to any particular person, the only effect of the act was to change his name. *Den on dem. Drake* v *Drake*, 110
2. An act legitimating a bastard to his putative father, does not render the collaterals of the latter capable of succeeding to the former. *Ibid.* 118

LEVY.

A levy by a sheriff upon goods, where they

remain in possession of the defendant, is no payment or satisfaction of the judgment, and a new execution may issue, as well where there are several defendants, as where there is but one. *Binford* v *Alston et al.* 351

LICENSE.

Vide Evidence, 15.

LIMITATIONS, STATUTE OF.

1. A surety who pays money for his principal may maintain an action against his co-surety for his rateable part, without first making a demand, and the statute of limitations, therefore, begins to run from the time of the payment of the money. *Sherrard* v *Woodard* 360
2. Where a note is payable on demand, *semble* that the statute of limitations begins to run from its date. *Ibid.* 362
3. The act of 1777 (*Rev. c* 115 § 16) authorises the sheriff to dispense with a bail bond, upon executing *mesne* process; but he thereby becomes special bail, and the non-payment of the amount with which he may be fixed, is a breach of his official bond; and the act of 1810 (*Rev. c* 800) limiting the time within which actions may be brought upon sheriffs' bonds, does not protect his sureties until six years after final judgment against him as bail. *Governor, ex rel. Barker,* v *Munroe et al.* 412
4. Although no *laches* are imputed to the State, and as to it, the rule is *nullum tempus occurrit,* &c yet, this is not the case as to those bodies to whom the execution of public trusts are confided.—And where the County Court brought an action of *assumpsit* against a Treasurer of public buildings, *it was held,* that the act of limitations was a bar — *Armstrong, Cha'n. &c.* v *Dalton, Ex'r.* 568

Vide Executors and Administrators, 5—Possession, 1, 2, 3, 4, 6, 8—Scire facias 5

LIQUIDATED ACCOUNTS.

Vide Justices' Jurisdiction, 1, 2, 4.

MAIL COACH.

Vide Toll.

MALICIOUS PROSECUTION.

Suing out a warrant "for taking a false oath" in a certain suit, "knowing it to be false" is a prosecution for perjury.—*Cabness* v *Martin,* 106

MESNE PROFITS.

It seems, that in an action for *mesne profits,* the jury may consider in mitigation of damages, permanent improvement honestly made by the defendant, and actually enjoyed by the plaintiff. *Dowd* v *Faucett,* 95

MONEY HAD AND RECEIVED, OR LENT.

Vide Assumpsit.

MORTGAGE.

1. A deed executed to secure recited debts, is a mortgage, although it contains neither a *proviso* for redemption, nor a declaration of its trusts, and the fact of the trust of the surplus being declared in a separate and unregistered paper, will not vitiate it as a security for the recited debts. *Den on dem. Skinner* v *Cox,* 59
2. The *non*-registry of a separate declaration of the trusts of a mortgage does not affect it, except as to the trusts thus declared. *Ibid.* 60

NEW TRIAL.

1. The admission of testimony, even if improper without an objection, is not a reason for granting a new trial. *Den on dem. Green* v *Harman.*
2. A new trial will not be granted for error in the opinion of the Court below, where that error appears to this Court not to affect the rights of the parties.—*Graham* v *Houston,* 236
3. Where there is in the record no exception, or case stated on which the motion for a new trial was founded, a new trial will not be granted; and if no error is perceived in any other part of the record, the judgment will be affirmed. *Den on dem. Lawson* v *Smith,* 239
4. The refusal by the court to permit a witness to be re-examined, is no ground for a new trial in this Court, it being discretionary with the Court below, to permit it or not. *Barton* v *Morphis,* 240

Vide Judge's Charge, 1, 3.

NOTICE TO QUIT.

Vide Ejectment, 1.

OFFICE.

1. An office is the property of the incumbent. *Hoke* v *Henderson*, 17
2. In the absence of a constitutional restriction, the creation, continuance, duties and emoluments of an office, are matters of political expediency, and to be judged of solely by the Legislature. *Ibid.* 19, 20
3. But it cannot continue an office, and oust the incumbent, and transfer his right to another. *Ibid.* 21
4. Distinction between offices which are mere political agencies, and those to which a personal interest are attached. The first may be vacated at any time, the second only upon conviction for default. *Ibid.* 21
5. An office created by statute may be destroyed by the Legislature; but it cannot continue the office, and either lessen the tenure of the incumbent, or transfer it to another. *Ibid.* 24

Vide Clerk, 1, 2.

OFFICIAL ACTS.

1. Generally the execution of powers, and the performance of official duties, must literally conform to the terms prescribed. *Den ex dem. Avery* v *Rose*, 552
2. But the exact observance of form by an officer is not required to give effect to his acts, when it will defeat the primary object of the Legislature. As in execution sales, the object being to enhance the price, for the encouragement of bidders, they are not affected by irregularity in the prior acts of the Sheriff. *Ibid.* 553
3. It is otherwise when the irregularity is such as must be known to, or is procured by the purchaser, as if he buy at private sale. *Ibid.* 554

OFFICIAL BONDS.

Vide Bonds.

OUSTER.

Vide Possession 1,—Tenant in Common, 1, 2.

PARTITION.

1. A proceeding for partition at law, cannot take place except there be a common possession; and a common possession is always implied from a common title until the contrary be shown. *Thomas & Wife*, et al. v *Garran*, 223
2. But if an actual ouster be made by one tenant in common of his co-tenant, there is no longer a common possession, and the remedy is not by petition for partition, but by ejectment. *Ibid.* 223

PARTNERSHIP.

1. Receiving the promissory note of one partner in *payment* of an open account against the firm, and delivering up the account in writing, does not of itself discharge the original demand. *Wilson & Conner* v *Jennings*, 90
2. Whether the title of land purchased by partners, but which is not conveyed to them as partners, survives under the act of 1784 (*Rev. c.* 204) or descends to the heir of the deceased partner. Qu! *Den ex dem. Ricks* v *Blount*, 130
3. On an attachment against one partner for his separate debt, only the separate property of that partner can be seized—the partnership effects cannot be taken. *Jarvis* v *Hyer et al.* 367
4. Partners are joint tenants of their debts and merchandize, but the *jus accrescendi* only holds, to enable the survivor to get in the debt, and settle the affairs of the firm. *Ibid.* 369
5. Where a partner executed a bond in the name of the firm, and upon being informed it did not bind his partners, took it back, and with the consent of the obligor, removed the seal and re-delivered it with an intent to bind the company, it is effectual as their promissory note. *Horton* v *Child*, 460
6. The simple contract debt of a partnership is not merged by the several bond of a partner. *Ibid.* 462

PATENTS.

Vide Scire Facias, 3, 4, 6.

PERJURY.

Vide Malicious Prosecution.

PLEAS AND PLEADING.

1. Where one of two joint owners of a chattel sues alone in *trespass*, advan-

tage can only be taken of the *non joinder* by plea in abatement, and the objection comes too late after the defendant has pleaded in chief. *Graham* v *Houston*, 238

2. The failure to serve the defendant with the copy of a declaration, filed in the County Court, five days before the first day of the term, can only be taken advantage of by plea in abatement, and not by a mere motion to dismiss. *Laverty and Gantly* v *Turner et al.* 275

Vide Jury and Jurors, 2.

PLEDGE.

Vide Contract, 3.

POSSESSION.

1. Where A has two coterminous grants, and B another, which covers a part of one of them, and is the oldest, and a fence of A upon the tract to which he has title, runs very near the line of the two tracts, and encloses a small portion of B's land, which was also covered by A's grant, it was held, B not being in possession—

1st. That a possession of seven years gave A a title to all the land within his enclosure.

2d. That the enclosure being of a part so small, that B might reasonably conclude it was a mere mistake in running the fence, it was not, as to him, an entry upon the land to which he had title, and was not an ouster of him beyond the enclosure.

3d. That although cutting timber and overflowing the land of B, by A, were not in themselves ousters of B, so as to constitute an adverse possession by A, yet these facts, taken in connection with the fence running upon his land, were proper to be left to the jury, as testimony from which they might infer an ouster. *Den on Dem. Green* v *Harman*, 158

2. Overflowing land by stopping a stream below, is not a possession which will perfect a defective paper title. *Ibid.* 160

3. Neither is cutting timber—there must be some act which is equivalent to residence or cultivation. *Ibid.* 160

4. Making turpentine is probably an occupation of land, which, if continued seven years, will perfect a defective paper title. *Ibid.* 161

5. When the owner of one or two adjoining grants runs his fence so near the line as to induce a belief that he intended to follow it, but actually includes land not his own, the possession thus acquired is not adverse. *Ibid.* 163

6. Under the act of 1791, (*Rev. c* 346,) a possession of twenty-one years, with colour of title under known and visible boundaries, constitutes a valid title, and no evidence tending to rebut the presumption that a grant had in fact issued, can defeat such title. *Graham* v *Houston*, 233

7. Possession of the whole of a tract of land, in virtue of the actual possession of part, holds only where no other person is in the actual possession of any part—as soon as another takes possession of part, either with or without a proper title, the plaintiff loses possession of that part. *Ibid.* 233

8. The design of the act of 1791 was to give that protection to individuals against the State, which the act of 1715 afforded to them against each other; in other words, to render possession a positive bar. *Ibid.* 235

POWERS.

Vide Official Acts, 1.

PRACTICE.

Vide New Trial, 4—Pleas and Pleading, 2—Removal of Causes, 2, 4.

PRESUMPTION OF A GRANT.

1. Where lands have been overflowed by a mill pond for forty years, without any claim for damages by the owner, a jury may from the acquiescence presume a grant of the easement. *Wilson* v *Wilson et al.* 154

2. From long and uninterrupted possession of land as owner, a grant will be presumed. This presumption is founded mainly upon the known inadequacy of human tribunals to ascertain the real truth of remote transactions, and does not depend upon a supposed correspondence between the fact and the presump-

tion in each particular case, and its character is determined by its origin. It is not merely a presumption of fact which a jury *may* make; nor is it a presumption of law, which cannot be rebutted; but it is a presumption which the law requires, and the court should direct the jury to make, unless proof is offered which shows the fact to be otherwise.—*Den on dem. Rogers et al.* v *Maybe*, 180

3. To raise this presumption between individuals, twenty years is sufficient, and in cases not within the act of 1826 c 28, less than twenty years is not, as against the State, the precise period is not determined, but forty years is certainly enough. *Ibid.* 180

4. This presumption extends not only to grants and deeds, but to every thing necessary to support the title of the possessor. *Ibid.* 180

5. When however, one enters originally not as owner, but under the title of another, even a very long possession will not raise this species of presumption;—there, time, however long, has only its usual and natural effect, as the foundation for an inference of fact, which the jury may draw or not, as they may or may not believe the fact in the particular case to compare with the inference. *Ibid.* 180

6. The doctrine of presumption discussed and its foundation stated by RUFFIN, C. J. *Ibid.* 188

PRIVATE ACT OF ASSEMBLY.

Vide Evidence, 3—Legitimation, 1, 2.

PROBATE.

Vide Wills, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25.

PROMISE TO PAY THE DEBT OF ANOTHER.

Vide Frauds, Statute of.—Justices' Jurisdiction, 3.

REGISTRATION.

Vide Deeds in Trust, 1, 2,—Mortgage, 1, 2.

RELIGIOUS CONGREGATION.

The disturbing of a congregation assembled for the purposes of religious worship, by laughing and talking, and indecent actions and grimaces, during the performance of divine service, is a misdemeanor, and *per se* indictable. *State* v *Jasper*, 323

REMAINDER IN PERSONAL ESTATE.

1. A limitation over of slaves, after a bequest for life, upon the executors assent to the legacy, becomes a vested legal estate which may be assigned and which cannot be destroyed by any act of the legatee for life. *Barnett* v *Roberts*, 81

2. A, by his will devised his property to his two children, and if either of them died without leaving issue, the whole of his estate both real and personal to go to the survivor. B, one of the children, upon a bill for an account against the executors of A, obtained a decree for a sum of money, in part performance of which, he accepted certain negro slaves, which were not of the property of his testator. On the death of B, without leaving issue, the survivor is not entitled to recover these slaves from a stranger to whom they had been *bona fide* sold by B. *Southerland and Wife* v *Webb*, 245

REMOVAL OF CAUSES.

1. It is not necessary in an affidavit for removal of a cause, that the *belief* of his affiant should be stated; it is sufficient if it sets forth the *facts* on which he grounds his belief. *State* v *Seaborn*, 305

2. An order of removal to "C—— county," without saying the Superior Court of the county, is sufficient. *Ibid.* 305

3. The Judge of the Superior Court can alone decide on the sufficiency of the facts stated in an affidavit for removal, and his decision is final. *Ibid.* 314

4. Where the time of holding a Court mentioned in an order of removal, differs from the true time fixed by law, it is mere surplusage, and does not vitiate the subsequent proceedings. *Ibid.* 322

RENT.

Vide Executors and Administrators, 7.

Vide Judgment, 3—Levy.

SCIRE FACIAS.

1. A *scire facias* to revive judgment, tho' to some purposes a new action, is yet in the main to be regarded as the continuation of a former action. *Binford* v *Alston et al.* 353
2. Where a *sci. fa.* to revive a judgment issues against three, and only two are summoned, and it is admitted that the third is insolvent and removed out of the State, the plaintiff may have execution against the two who are summoned — *Ibid.* 354
3. A grantor cannot under the act of 1798 (*Taylor's Revisal, Appendix, p.* 193) maintain a *scire facias* to repeal a grant for the same land, when the latter is older than the grant to him. *Crow* v *Holland et al.* 417
4. A deed for land, which is held adversely to the vendor, passes no interest to the vendee, and he cannot maintain a *scire facias* to repeal a grant under which the person in possession claims. *Hoyle et al.* v *Logan,* 495
5. An actual adverse possession of seven years is a bar to a *sci. fa.* to vacate the grant under which the defendant holds. *Ibid.* 496
6. The act of 1798 (*Taylor's Rev. Appendix*) establishing a court of patents, does not enable the patentee in a junior patent to repeal an elder one, although his entry was prior to that of the patentee in the latter. *Featherston* v *Mills,* 596

Vide Execution, 11, 12.

SET-OFF.

1. Where a dealer with a Bank had a balance to his credit upon a general cash account, and died indebted to it by judgment, and upon simple contract, the Bank has a right, independent of the statute of set-off, to apply the balance to the latter debt. *State Bank* v *Armstrong, adm'r.* 519
2. A debt due to one of several defendants by the plaintiff, cannot be pleaded as a set-off. *Ibid.* 522
3. The balance of a general cash account due by a Bank to a depositor, is a *debt,* which may be set-off to any claim of the Bank against the depositor, and is not *money,* which the latter may apply at his election, to either of those claims. *Ibid.* 525

Vide Covenant, 1.

SHERIFF.

1. *Nulla bona* is the proper return for a sheriff, where one creditor postpones the sale, and another then proceeds to sell and exhaust the property. *Bank of Newbern* v *Pullen,* 300
2. A sheriff who has seised property sufficient to satisfy an execution, and surrendered it upon receiving a forthcoming bond, is entitled upon a breach of the bond, to recover the amount of the judgment; although he may not have paid it to the plaintiff in the execution. *Foster* v *Frost,* 437

Vide Bail 2, Bond 1, Land sold for Taxes, 3.

SHERIFF'S RETURN.

Vide Sheriff 1, Evidence 11, 12.

SHERIFF'S SALE.

A sale of lands by the sheriff under execution, is not within the act of 1819, (*Rev. c.* 1016,) making void parol contracts for the sale of lands and slaves. *Tate* v *Greenlee* 149

Vide Official acts.

SLANDER.

1. The repetition of a slanderous report is actionable, and the defendant cannot justify by proving the existence of the report, without also proving it to be true. *Hampton et ux.* v *Wilson,* 468
2. Per RUFFIN, C. J. *arguendo.* The rule that one who repeats a slanderous report, and gives the name of his author, may justify by pleading that fact, has been doubted, and must depend upon the intent with which the report and the name of the author are mentioned. It *seems* that it does not obtain in actions for libels. *Ibid.* 468

SLAVES, GIFT OR SALE OF.

1. The act of 1806 (*Rev. c.* 701) requiring the due and fair execution of deeds of gift for slaves to be proved on the

trial, does not introduce a new rule of proof, but only repels the idea that they may be read under an *ex parte* probate for registration. *Andrews* v *Shaw*, 71

2. One claiming a slave against a subsequent purchaser from his vendor, must produce a bill of sale registered according to the act of 1784 (*Rev. c.* 225) or prove a delivery of the possession, which under the act of 1792 (*Rev. c.* 363) will dispense with it. And where a slave was sold at auction, and the plaintiff being the highest bidder, the crier said to the slave "there is your master," and the vendor being present did not object, but entered the plaintiff's name and bid in the account of sales, and gave him time to comply with the terms, but afterwards sold the same slave to the defendant—it was held that no title vested in the plaintiff, so as to enable him to recover the slave in detinue. *Mushat* v *Brevard*, 73

3. Whether the entry of a purchaser's name and bid, in an account of auction sales, made by the vendor, is a note or memorandum within the meaning of the act of 1819 (*Rev. c.* 1016) Qu? *Ibid.* 76

4. Questions under the act of 1819, wording parol contracts for the sale of slaves, &c. can only arise in actions for the breach of executory contracts. *Ibid.* 77

5. Delivery of a slave in order to vest the title in the vendee, need not be by marval touching of him, but must be by some act proving unequivocally that the possession is changed. *Ibid.* 78

6. A crier who does nothing but proclaim the bids made at an auction sale, is the servant of the vendor, and has no authority to bind him in any respect. *Ibid.* 79

7. A parol gift of slaves is, in law, void against creditors and purchasers. *Harris* v *Yarborough, adm'r.* 166

8. It is not essential to the validity of a deed of gift for slaves, under the act of 1806, that the subscribing witness should be able to testify to the *delivery*, as well as to the *signing* and *sealing*. That fact may be proved by other testimony. *Vines* v *Brownrigg*, 265

SLAVES, CARRYING AWAY OR CONCEALING OF.

1. Upon an indictment under the act of 1825, (*Taylor's Rev. c.* 1289,) "for carrying, conveying and concealing a slave on board a vessel, with the intent and for the purpose of conveying the slave beyond the limits of the State; and of enabling her to effect her escape out of the State,' a verdict finding the prisoner 'guilty of the felony of carrying, conveying and concealing, as charged in the bill of indictment," is defective. *State* v *Edmund*, 340

2. A mulatto free man of color is a citizen of the State, and a slave, a person within the meaning of the act. *Ibid.* 340

SPECIFIC ARTICLES.

Vide Contract, 1, 2, 3.

STATUTES, CONSTRUCTION OF.

A different rule prevails in construing public and private statutes; the latter are never extended beyond their words, or a necessary implication from them, and are restrained in favor of those who are not mentioned in them. *Den ex dem. Drake et al.* v *Drake et at.* 116

STATUTES CONSTRUED OR COMMENTED UPON.

13th Eliz. c. 6 } O'Daniel v Crawford, 197
27th Eliz. c. 4 }
5th Geo. 1. c. 13 West v Ratledge, 31
5th Geo. 2. c. 7 Ricks v Blount, 128
1715 Rev. c. 2 Sherwood v Woodard, 360
" " " Armstrong v Dalton, 568
" " c. 3 *Den ex dem.* Barfield v Combs, 514
" " c. 7 *Den ex dem.* O'Daniel v Crawford, 197
" " c. 10 Pratt v Kitterell, 168
1741 Rev. c. 28 Jones v Cannady, 86
1751 Rev. c. 50 *Den ex dem.* Barfield v Combs, 514
1756 Rev. c. 57 § 7 State Bank v Armstrong, 519
1762 Rev. c. 69 § 19 & 20 Dowd v Davis, 61
" " Harris v Richardson, 279
" " § 7 Davis v Somerville, 382
" " c. 70 Hatcher v McMorine, 122
1777 Rev. c. 115 § 35 West v Ratledge, 31

1777 Rev. c. 115 § 58 Pratt v Kitterell, 168
" " § 25 Gillis v Macay, 172
" " § 75 Hicks v Gilliam, 217
" " § 73 Laverty *et al.* v Turner *et al.* 275
" " § 16 Governor v Munroe *et al.* 412
" " § 69 Gray *et al.* v Hoover, 475
" " § 27 Broghill v Wellborn, 511
" " § 16 & 17 Ricks v Hayworth, 584
1779 Rev. c. 157 State v Seaborn, 305
1784 Rev. c. 225 Mushat v Brevard, 73
" " c. 204 § 6 Ricks v Blount, 128
" " c. 225 Harris v Yarbrough, 166
" " c. 204 Ross v Toms, 376
" " " § 11 Old v Old *et al.* 500
1786 Rev. c. 248 Hatcher v McMorine, 122
" " " § 2 Hubbell v Thurston, 502
1789 Rev. c. 311 Ricks v Blount, 128
" " c. 312 § 5 Harris v Richardson, 279
" " c. 308 Redmond v Collins, 430
" " " § 4 Goodman v Smith, 450
1791 Rev. c. 346 Graham v Houston, 232
1792 Rev. c. 363 Mushat v Brevard, 73
1794 Rev. c. 414 Arnold v Shepherd, 49
1796 Rev. c. 469 Gillespie v Hymans, 119
" " c. 452 State v May, 328
" " " State v Davis, 612
1798 Tay. Rev. Ap. p. 193 Crow v Holland, 417
" " " Hoyle *et al.* v Logan, 495
" " " Featherston v Mills, 596
" Rev. c. 492 Avery v Rose, 549
1802 Private Act Drake *et al.* v Drake *et al.* 110
1803 Rev. c. 627 Shipman v Mears, 484
" " " Arnold v Shepherd, 49
1804 Rev. c. 658 Ricks v Hayworth, 584
1806 Rev. c. 693 Hoke v Henderson, 1
" " 701 Andrews v Shaw, 70
" " " Vines v Brownrigg, 265
1807 Rev. c. 722 Sherrod v Woodard, 360
1808 Rev. c. 745 State v Seaborn, 305
1810 Rev. c. 800 State v Munroe *et al.* 412
1819 Rev. c. 1016 Mushat v Brevard, 73
" " " Tate v Greenlee, 149
" " 1004 Hester *et al.* v Hester *et al.* 228
1820 " 1037 Gregory v Perkins, 50
" " " Walton v Stallings, 56
" " " Moore v Collins, 384
" " 1045 Bryan v Washington *et al.* 479
1824 Tay. Rev. c. 1258 Buncombe Turnpike Co. v Newland, 463
1825 Tay. Rev. c. 1289 State v Edmund, 340
1826 Pamphlet c. 12 Wilson *et al.* v Jennings, 90
" " 10 Cooper v Chambers, 261
1827 Pamph. c. 2 Hatcher v McMorine, 122
1829 " 32 Wilson *et al.* v Jennings, 90
" " 22 Chaffin v Hanes *et al.* 103
" " 32 Bryan v Washington *et al.* 479
1832 " 2 Hoke v Henderson, 1

STATUTE ENGLISH, NOT IN FORCE.

The Statute of 11 Hen. 4, c. 9, is not in force in this State. *State* v *Seaborn*, 310

SUPREME COURT.

The Supreme Court acquires jurisdiction as a revising tribunal only by appeal, and its jurisdiction differs from that of those courts which take cognizance of of causes by writ of error. *Binford* v *Alston et al.* 351

Vide Appeal, 1—Costs, 1—Judgment, 2—Verdict, 3.

SURETY.

1. Where two persons engage in one common risque, as sureties for a third, and one of them subsequently takes an indemnity from the principal debtor, such indemnity enures to the benefit of all the sureties. *Fagan* v *Jacocks, adm'r.* 363

2. The implied contract between co-sureties, is a contract for mutual indemnity, and there is a complete cause of action

whenever the injury is sustained. *Sherrard* v *Woodard*, 363
2. Notice should be given by a surety to his co-surety, of the payment of money for their principal, before the commencement of the suit. *Ibid.* 363
Vide Executors and Administrators, 2, 3,—Limitations, Statute of, 1.

TENANT IN COMMON.

1. The sole enjoyment of the property by one tenant in common, is not of itself an ouster of his co-tenant, the possession of one being the possession of all. But the sole enjoyment for a great number of years (say 21) without claim from another having right, and under no disability, becomes evidence of title, and raises the legal presumption of an ouster. *Thomas and Wife et al.* v *Garvan*, 225
2. The possession of one tenant in common is, in law, the possession of all—and the sole, silent occupation by one of the entire property, without an account to, or claim by the others, is not an *ouster*, or evidence from which an ouster can be inferred, unless continued for twenty years. *Den. on dem. Cloud* v *Webb*, 290
Vide Ejectment, 2—Evidence, 4, 5—Partition, 1, 2.

TOLL.

A carriage used for the transportation of the mail and of passengers, is a pleasure carriage within the act of 1824 (*Tay. Rev. c.* 1258) incorporating the Buncombe Turnpike Company, and subject to a toll of two dollars and fifty cents.—*Buncombe Turnpike Company* v *Newland*, 463

TOWNS.

1. Under the provisions of the private acts for regulating the town of Halifax, the Commissioners of the town have authority to call out the hands and command the personal labor of those residing within its corporate limits, for the purpose of repairing the streets. *State* v *Commissioners of Halifax*, 345
2. The Commissioners of a town are not of common right bound to repair the streets, and therefore an indictment against them for not repairing, must set forth on its face how that obligation has been imposed upon them. *Ibid.* 345
3. In an indictment against the Commissioners of a town, it is not sufficient to alledge a general breach of duty, but the indictment must charge specifically which of the duties imposed has been neglected. *Ibid.* 350
4. An ordinance of the Commissioners of a town, directing under a penalty, cattle to be penned at night, applies only to residents of the town—not to those living beyond the corporation limits, altho' their cattle may stray into the town.—*Commissioners of Plymouth* v *Pettijohn*, 591
5. One who is not a corporator, but who comes into a corporation and violates any of its ordinances, is subject to the penalties imposed therefor. *Ibid.* 593
6. Whether the Commissioners of a town have power to forbid cattle to range in its streets, and to impose a penalty upon the owner, or distrain the cattle. Qu! *Ibid.* 594

TRESPASS.

1. One who rents turpentine boxes, agreeing to give a certain part of the turpentine for rent, is not a tenant, has no interest in the soil, and the owner may bring *trespass quare clausum fregit* for an entry upon the land, *et semble*, for taking away the turpentine also. *Graham* v *Houston*, 232
2. For acts done after an ouster, no action lies till a re-entry, but only for the first entry. *Ibid.* 232
3. In *England*, an actual re-entry on the *locus in quo* is necessary to entitle a party to recover for a trespass committed subsequent to the first ouster, because there, possession by actual occupation of the very part, is requisite to maintain trespass. But here a *constructive* possession suffices. *Ibid.* 239

TROVER.

1. The plaintiff in trover must have both the right of property and of present possession, and where one who had hired a slave for a year, sold him, and the owner brought trover during the term,

it was held that he could not recover, although the defendant claimed an absolute interest in the slave. *Andrews* v *Shaw*, 70

2. Where one residuary legatee, who had hired a slave, part of the residue, from the executor for a year, sold him tortiously, in the presence of a joint legatee, who did not disclose his title, the executor cannot maintain trover against the latter. *Governor et al.* v *Freeman*, 472

3. One who stands by, while property in which he has an interest is sold, waives his title in favor of the vendee. But he does not thereby become guilty of a conversion, as to a third person. *Ibid.* 474

4. A person, not the guardian of infants, who takes upon himself to hire out their slaves, making the bonds payable to himself, is a *wrong-doer*, and may be rendered liable for a conversion; and the proper measure of damages is the amount of the hiring, with interest from the expiration of the credit. *Dunstan et al.* v *Hardy*, 572

5. The doctrine of conversion stated by RUFFIN, Judge. *Ibid.* 572

Vide Estoppel, 1.

UNCONSTITUTIONAL ACTS.

Vide Clerks, 1—Constitution, 1.

USURY.

1. In debt for usury, the declaration stated a loan to A, but the proof was a loan negotiated by A, as the avowed agent of B; *held* that the proof did not support the declaration. *Jones* 2 *t.* v *Cannady* 86

2. If an usurious loan be effected by making a note payable to an agent of the borrower and endorsed to the lender, whether a declaration setting out the facts specially, without averring the loan to be either to the maker or endorser, be sufficient. Qu? But if the declaration aver a loan to one of them, the plaintiff must show a transaction which in fact and in law, makes a loan to that person. *Ibid.* 87

3. In questions of usury, the real transaction may always be shown, as well to support, as to avoid the security. *Ibid.* 88

Vide Verdict, 2.

VARIANCE.

1. Where the plaintiff declared on a single bill of the defendant for four hundred and forty-seven *dollars* and sixty-six cents, and the instrument offered in evidence corresponded with that set forth, except that it wanted the word "*dollars*"—held that this was no *variance*, and that the word "*dollars*" must be supplied by construction. *Stephens* v *Smith*, 293

2. A variance between the bond declared on, and that produced in evidence, can only be taken advantage of upon the trial; it forms no ground for arresting the judgment. *Souter* v *Davenport*, 600

Vide Amendment and Jeofail, 1—Usury, 1.

VERDICT.

1. A general verdict upon a declaration containing a defective count, will not entitle the plaintiff to judgment. But when it appears that the evidence applied only to the good count, the verdict will be corrected. *West* v *Ratledge*, 42

2. So where in debt on the statute of usury, one count was for double the sum lent, and another for double the amount lent and interest received, and the verdict was for the first sum, it was applied to that count. *Ibid.* 42

3. The Supreme Court cannot set aside a verdict, although in their opinion, found on slight testimony. *Goodman, Adm'r:* v *Smith, Adm'r.* 459

WARRANTY.

1. In the sale of a chattel, neither the words "warrant and defend," nor the words "warrant to be good sound property and healthy," constitute a covenant of title. The first is for quiet enjoyment, and the last apply to the state and quality of the article sold. *Cowan* v *Silliman* 46

2. Nominal damages only, can be recovered upon a covenant of title, when the action of the person having title is barred by the act of limitations. *Ibid.* 47

3. A covenant for quiet possession is not broken by a demand of possession made by one having title. *Ibid.* 47

WIDOW.

1. A widow, when her husband dies intestate, must, under the act of 1796, (*Rev. c.* 469) file her petition for a year's support, at the term of the County Court, when letters of administration upon his estate are taken out. *Gillespie* v *Hyman, Adm'r.* 119
2. Whether a widow, who has dissented from her husband's will, cannot file her petition for a year's support at the time of entering her dissent. Qu? *Ibid.* 121

WILLS.

1. The act of 1819 (*Rev. c.* 1004) only applies to complete and finished instruments, but does not prohibit the introduction of parol evidence, to show that a paper writing offered for probate, was never in fact the will of the deceased.—*Hester* v *Hester et al.* 228
2. There is a presumption arising on the face of every imperfect testamentary paper, that it was not intended to operate in its then unfinished state; but this is a presumption of fact, and liable to be rebutted by other testimony. *Jones et al.* v *Kea et al.* 301
3. A clause of attestation being annexed to a paper not attested, is not *conclusive* evidence of the abandonment by the testator, of his intention that it should operate as his will. *Ibid.* 301
4. Whether it was the testator's intention that a paper purporting to dispose of both real and personal estates, should operate as a disposition of one, unless it can take effect as to both, is a question of fact for the consideration of the jury. *Ibid.* 302
5. Where a will, giving the executors power to sell land, and directing them to pay the interest of the personalty to a married woman for her life, and after her death to divide the whole, and the rents of the land, between her children, was propounded by the executors, and upon the *caveat* of her husband, was rejected, the sentence is conclusive both upon her infant children then in being, and those born afterwards. *Redmond et al.* v *Collins et al.* 430
6. A mistake in a verdict in the County Court, finding against a proposed will, without collusion between the executors and the caveator, is no reason for permitting it to be re-propounded by a legatee, although the result would have been different, had the executors appealed. *Ibid.* 435
7. An erroneous verdict and sentence against a will, cannot be set aside in the court of probate, except on an allegation and proof of newly discovered testimony. *Ibid.* 436
8. A sentence for or against a will, is not binding on those who are not parties or privies. But privies are those who claim through a party, or who have notice of the proceeding. *Ibid.* 437
9. Probate in common form, is where the next of kin have no notice. Probate in solemn form, is where they are cited to see the proceeding. *Ibid.* 437, 438
10. Similar in its effect to the last, is the case of intervention by the next of kin, although not cited. *Ibid.* 438
11. In none of these cases can a sentence be re-examined at the instance of one who is a party or privy to it. And this privity may be shown *dehors* the record by proof in *pais*. *Ibid.* 438
12. Probate in common form may ordinarily be revoked at the instance of the next of kin; because its form implies that they are not privy to it. *Ibid.* 439
13. This presumption may be repelled by lapse of time, or notice of a contest between the executor and another of the next of kin. *Ibid.* 439
14. But courts of probate act upon different principles in applications to revoke letters of administration, and re-propound a will which has once been rejected.—*Ibid.* 439
15. This never is done at the instance of the executor who formerly propounded it, except in cases of fraud, surprise, or newly discovered testimony. *Ibid.* 440
16. A legatee may propound a will when the executor renounces. *Ibid.* 440
17. But the executor is both *pars princi-*

palis and *legitimus contradictor*, and sentence against a will *bona fide* propounded by him, binds all persons interested under it, except under special circumstances. And neither infancy, coverture, non-residence, nor that the legatee was not *in esse*, are such circumstances. *Ibid.* 442, 443

18. It is probable that in this State a rejection of a will, when offered *ex parte* by the executor, would neither bind him nor a legatee. But it is otherwise of an issue formally made up between the executor and one of the next of kin, resulting in a sentence against the will.—*Ibid.* 443

19. The act of 1789 (*Rev.* c. 308) does not alter the law in these respects, but only directs a trial by jury, and a new mode of proof. *Ibid.* 443

20. Devisees are not represented by the executor, and are not affected by a sentence against a will when propounded by him, unless they are parties to the proceeding. But they cannot re-propound it, and demand probate of it, as a will of land as well as chattels. *Ibid.* 445

21. Their remedy is by proving it in an ejectment for the devised premises, which may be done when it has been rejected on the allegation of the executor, without notice to them. *Ibid.* 446

22. In an issue of *devisavit vel non*, under the act of 1789, the court cannot notice equitable interests in land devised in the will. It is sufficient if the devisee in trust is a party. *Ibid.* 448

23. If on the trial of that issue, the trustee betrays the interest of the *cestui que trust*, the remedy of the latter is in Equity. *Ibid.* 448

24. So when a power over land is created by the will, the depository of the power is the only actor in the court of probate. *Ibid.* 449

25. And whenever the trustee or depository of a power is bound by the sentence of a court of probate, the *cestui que trust*, or person interested under the power, is, in that court, also bound.—*Ibid.* 449

26. A witness to a will of land, who was, at the time of his attestation, a presumptive heir to the devisor, is not interested in the devise, within the meaning of the 11th section of the act of 1784 (*Rev.* c 2041.) *Old* v *Old et al.* 500

27. An attesting witness to a will, who has become interested since his attestation, need not be produced by the person propounding it, but the will may be established by proof of his hand-writing. *Ibid.* 502

Vide Bequest—Devise—Evidence, 6.

WITNESS.

Vide Evidence, 4, 5, 6, 16,—Wills, 26, 27.

WRIT OF ERROR.

The Supreme Court may, by writ of error, reverse the judgments of the County Courts, but cannot, in any way, quash them, or supersede them, as nullities.—*Swain* v *Fentress*, 603

Vide Certiorari, 5, 7.

WRITS.

1. Innovations upon the established form of writs, especially of such as concern the personal freedom of the citizen, ought not to receive judicial sanction. *Finley* v *Smith*, 95

2. A writ commanding to take the body and safely keep, &c. "*until the sheriff make a sum of money, and to have that money in court at the return day*," is not a *ca. sa.* but a novelty unknown to our law. *Ibid.* 95

3. Whether the sheriff would be justifiable in obeying, or punishable for refusing to obey it. Qu? But it is, at all events, not sufficient to charge bail. *Ibid.* 95

4. The seal of the court is indispensable to the validity of a writ running out of the county in which the court sits. Without the seal, the writ is a mere nullity. *Ibid.* 97